No. 14-1096

Title:	Jorge Luna Torres, Petitioner
	v.
	Loretta E. Lynch, Attorney General
Docketed:	March 11, 2015
Linked with 14A770	
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(13-2498)
Decision Date:	August 20, 2014
Rehearing Denied:	November 7, 2014

Questions Presented

—Date—	——Proceedings and Orders——
Jan 13 2015	Application (14A770) to extend the time to file a petition for a writ of certiorari from February 5, 2015 to March 9, 2015, submitted to Justice Ginsburg.
Jan 16 2015	Application (14A770) granted by Justice Ginsburg extending the time to file until March 9, 2015.
Mar 9 2015	Petition for a writ of certiorari filed. (Response due April 10, 2015)
Apr 2 2015	Order extending time to file response to petition to and including May 11, 2015.
May 6 2015	Order further extending time to file response to petition to and including May 18, 2015.
May 18 2015	Brief of respondent Loretta E. Lynch, Attorney General in opposition filed.
May 27 2015	Reply of petitioner Jorge Luna Torres filed.
Jun 2 2015	DISTRIBUTED for Conference of June 18, 2015.
Jun 22 2015	DISTRIBUTED for Conference of June 25, 2015.
Jun 29 2015	Petition GRANTED.
Jul 9 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 18, 2015.
Jul 9 2015	The time to file respondent's brief on the merits is extended to and including September 22, 2015.
Jul 16 2015	Motion to dispense with printing the joint appendix filed by petitioner Jorge Luna Torres.
Aug 18 2015	Brief of petitioner Jorge Luna Torres filed.
Aug 25 2015	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Aug 25 2015	Brief amici curiae of National Immigrant Justice Center, et al. filed.
Aug 28 2015	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Sep 9 2015	SET FOR ARGUMENT on Tuesday, November 3, 2015.
Sep 10 2015	Record requested from the U.S.C.A. 2nd Circuit.
Sep 16 2015	Record received from U.S.C.A. 2nd Circuit is electronic.
Sep 22 2015	Brief of respondent Loretta E. Lynch, Attorney General filed.
Sep 29 2015	CIRCULATED

Oct 14 2015	Reply of petitioner Jorge Luna Torres filed. (Distributed)
Nov 3 2015	Argued. For petitioner: Matthew L. Guadagno, New York, N. Y. For respondent: Elaine J. Goldenberg, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

14-1096

No. 14-

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

JORGE LUNA TORRES,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Jorge Luna Torres, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is reported at 764 F.3d 152 (2d Cir. 2014). App. 1a. The opinion of the Board of Immigration Appeals is unreported. App. 15a. The opinion of the Immigration Judge is also unreported. App. 18a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on August 20, 2014. The Court of Appeals denied a timely petition for rehearing en banc on November 7, 2014. App. 24a. On January 16, 2015, Justice Ginsburg extended the time to file a petition for certiorari until March 9, 2015. No. 14A770. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

8 U.S.C. § 1101(a)(43) is reproduced in Appendix E. App. 25a.

STATEMENT

The circuits are split 6-1 on a classic question of statutory interpretation, pitting a literal interpretation of the statute against the view of some judges

that Congress must have meant something other than what it said.

Under the Immigration and Naturalization Act, an alien is ineligible for cancellation of removal if he has committed an "aggravated felony." 8 U.S.C. § 1229b(a)(3). This is just one of the many important immigration consequences that flow from a determination that one has committed an aggravated felony. A person who has committed an aggravated felony can be deported, 8 U.S.C. § 1227(a)(2)(A)(iii), is ineligible for asylum, 8 U.S.C. § 1158(b)(2)(B)(i), is subject to expedited removal proceedings, 8 U.S.C. § 1228(a)(3)(A), faces additional obstacles to reentering the U.S., 8 U.S.C. § 1182(a)(9)(A)(ii), receives a much longer prison sentence for reentering the U.S. without permission, 8 U.S.C. § 1326(b)(2), and can even be sent to a country where his life would be threatened, 8 U.S.C. § 1231(b)(3)(B). A lot turns on whether a particular offense is classified as an "aggravated felony."

The statute provides a very long definition of "aggravated felony," 8 U.S.C. § 1101(a)(43), which includes some crimes identified by their generic names (such as murder and rape, 8 U.S.C. § 1101(a)(43)(A)), and other crimes identified as those "described in" or "defined in" particular sections of the U.S. Code. For example, the statute does not say that arson is an aggravated felony. Rather, the statute defines as an aggravated felony "an offense described in ... section 844(d), (e), (f), (g), (h), or (i) of" Title 18, the provisions that criminalize arson and related explosives offenses. 8 U.S.C. § 1101(a)(43)(E)(i).

The statute also specifies that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." 8 U.S.C. § 1101(a)(43) (unnumbered penultimate sentence). In determining whether a state offense is "described in" a particular section of the U.S. Code, courts use the familiar "categorical approach"—they compare the elements of the state offense with the elements of the specified federal offense to see if they are identical. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Lopez v. Gonzales*, 549 U.S. 47, 57 (2006) (explaining that the penultimate sentence of § 1101(a)(43) "confirms that a state offense whose elements include the elements of a felony punishable under [the specified federal statute] is an aggravated felony"). This much is common ground.

The circuit split arises because many federal criminal statutes are not identical to their state analogues. The federal statutes often include an extra element pertaining to interstate commerce. Arson is a perfect example. In New York, arson includes three elements. A person is guilty of arson if he (1) intentionally (2) damages a building or motor vehicle (3) by starting a fire or causing an explosion. N.Y. Penal Law § 150.10(1). But federal arson, in addition to the three elements of state arson, has a fourth element with no counterpart in state arson. The property damaged by fire or explosive must be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). The elements of the two crimes are not identical. *See Jones v. United States*, 529 U.S. 848, 859 (2000).

The circuits are divided over the consequences of this difference. In the decision below, the Second Circuit joined the Fourth, Fifth, Seventh, Eighth, and Ninth Circuits in deciding that this extra element of federal crimes should be ignored. In the view of these circuits, when Congress defined an aggravated felony as an offense "described in" a federal statute, Congress must have meant "described in, except for the interstate commerce element of the federal offense." The Third Circuit, by contrast, correctly holds that "described in" means "described in." The Third Circuit thus concludes that the very same statute at issue in this case—third degree arson under N.Y. Penal Law § 150.10—is *not* an aggravated felony as defined by the INA, because it does not include an interstate commerce element.

1. The BIA's conflicting interpretations

The Board of Immigration Appeals has wrestled with this question for many years, beginning well before the events that gave rise to this case. When the BIA first interpreted 8 U.S.C. § 1101(a)(43)(E), it read the statute literally, to mean that a state offense is not "described in" a federal statute if the state offense lacks the federal statute's interstate commerce element. *In re Vasquez-Muniz*, 22 I. & N. Dec. 1415 (BIA 2000), involved an alien who had been convicted in California state court of unlawfully possessing a firearm. The government instituted removal proceedings on the theory that the crime was an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii), as an offense "described in" 18 U.S.C. § 922(g)(1). The government acknowledged

that section 922(g)(1) includes an interstate commerce element that the state offense lacks, but the government urged the BIA to ignore this "jurisdictional" element on the ground that only the "substantive' elements of crimes should be considered in determining whether a state offense is "described in" a federal statute. *Vasquez-Muniz*, 22 I. & N. Dec. at 1418.

The BIA rejected the government's contention. Although the BIA acknowledged that "there is no dispute" that the requirement of an effect on interstate commerce is a "jurisdictional element," the BIA found that "[c]haracterizing it as such ... does not change the fact that it is an element of the offense." *Id.* at 1420. The BIA consulted dictionaries and other federal statutes for uses of the phrase "described in," and determined that each usage "reflects a more specific meaning than something merely 'similar to' that which is referenced; rather, in each instance, the phrase 'described in' clearly refers to something specifically set forth elsewhere." *Id.* at 1421. It was thus not enough that the state offense was similar to the federal offense for it to be "described in" the federal statute. The two offenses had to have the same elements. *Id.*

The BIA further noted that elsewhere in the U.S. Code, where Congress has referred to crimes "described in" federal statutes, but has wished to exclude from the described crime the element giving rise to federal jurisdiction, it has done so explicitly. *Id.* at 1421-22. For example, 18 U.S.C. §§ 3142(e)(2)(A) and 3142(f)(1)(D) refer to the deten-

tion of persons convicted of a federal offense "or of a State or local offense that would have been an offense described in [specified parts of the U.S. Code] if a circumstance giving rise to Federal jurisdiction had existed." 18 U.S.C. § 5032 likewise refers to "one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed." *Vasquez-Muniz*, 22 I. & N. Dec. at 1422.

The BIA rejected the government's argument that this literal interpretation of the statute would render meaningless the unnumbered penultimate sentence of section 1101(a)(43), which states that the term "aggravated felony" applies to an offense whether in violation of federal or state law. The BIA explained that this sentence clarifies that state offenses are not exempted from the definition of aggravated felony, but the sentence does not mean that every subsection of the statute necessarily includes a state offense. *Id.* at 1423. The BIA accordingly concluded that a state offense is not "described in" a federal criminal statute where the federal statute includes an interstate commerce element that the state offense lacks. *Id.* at 1424.

But the BIA changed its mind thirteen months later. In the interim, the Court of Appeals for the Ninth Circuit had taken the opposite view of the statute in an unrelated case. *See United States v. Castillo-Rivera*, 244 F.3d 1020, 1023-24 (9th Cir. 2001), *cert. denied*, 534 U.S. 931 (2001). In light of the Ninth Circuit's decision, the BIA issued a new

opinion in *Vasquez-Muniz* determining that a state offense may be "described in" a federal statute even if the state offense lacks an interstate commerce element present in the federal statute. *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002). The BIA, following the Ninth Circuit, now concluded that "it would be very rare for a state to include federal jurisdictional language within its criminal statutes. Consequently, if state crimes must include a federal jurisdictional element in order to be classified as aggravated felonies, then virtually no state crimes would ever be included." *Id.* at 211. Ever since, the BIA has taken the view that a state offense is "described in" a federal statute even if the federal statute includes an interstate commerce element that the state offense lacks.

In *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011), *vacated by Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014), the BIA applied its new interpretation to the New York arson statute that is at issue in the instant case. The BIA held that "the omission of the Federal jurisdictional element in § 844(i) from the State statute is not dispositive. The offense in section 150.10 of the New York Penal Law contains all of the other substantive elements that are contained in § 844(i), so it is an aggravated felony under the Act." *Id.* at 620.

2. The facts of this case

Petitioner George Luna[1] has been a lawful permanent resident of the United States since 1983, when his parents brought him to this country from the Dominican Republic at the age of nine. Ever since, Luna has lived in Brooklyn, New York. He is a carpenter and an electrician, and he is taking classes at City University of New York toward a degree in civil engineering. He owns his own home, not far from his parents, his brother, and his sister. Luna is engaged to be married. His fiancée is a graduate of Columbia University. Luna was her sole source of financial support while she earned a master's degree. They have postponed their wedding plans until they find out whether Luna will be able to stay in the country. He has only one blemish on an otherwise spotless record. In 1999 he pled guilty to one count of attempted arson in the third degree, in violation of N.Y. Penal Law §§ 110 and 150.10. He was sentenced to one day of imprisonment and five years of probation. App. 2a.

In 2006, Luna was returning to Kennedy Airport from a trip to the Dominican Republic when he was charged with inadmissibility as an alien convicted of a crime involving moral turpitude. He applied for cancellation of removal. An Immigration Judge found him ineligible for cancellation of removal un-

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[1] Petitioner's full name is Jorge Luna Torres. In accordance with Spanish-language naming customs, he uses the last name Luna. Because he has spent virtually all of his life in the United States, everyone calls him George, including his parents and siblings.

der 8 U.S.C. § 1229b(a)(3), on the ground that his state conviction of attempted arson was an aggravated felony. App. 18a-23a.

3. Proceedings below

The Board of Immigration Appeals dismissed Luna's appeal. App. 15a-17a. The BIA explained that in *Matter of Bautista* it had already determined that the New York offense of attempted arson in the third degree is an aggravated felony. App. 16a. The BIA noted that "the sole difference between the federal arson offense set forth at 18 U.S.C. § 844(i) and the New York state offense is that the federal offense has an additional element, namely, that the property must be 'used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.'" App. 16a (quoting 18 U.S.C. § 844(i)). But because this extra federal element was merely a "jurisdictional element," the BIA held, it could be ignored when comparing the federal and state offenses. App. 16a. The BIA concluded that state statutes "need not contain a nexus to interstate commerce in order to proscribe an offense 'described in'" their federal analogues. App. 16a.

Luna sought review in the U.S. Court of Appeals for the Second Circuit. After briefing, but before oral argument in Luna's appeal, the Third Circuit vacated the BIA's *Matter of Bautista* decision. App. 3a; *Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014). The Third Circuit determined that New York's arson statute does not qualify as an aggravated felony because it lacks the interstate commerce element. App. 3a; *Bautista*, 744 F.3d at 58-69. The Second Circuit

accordingly requested the parties to file supplemental briefs discussing the Third Circuit's decision, which they did before argument. App. 3a.

The Second Circuit denied Luna's petition for review. App. 1a-14a. The Second Circuit recognized that the Third Circuit's decision in *Bautista* "conflicts with interpretations by the Fifth, Seventh, Eighth, and Ninth Circuits of 8 U.S.C. § 1101(a)(43)'s 'offense described in' language." App. 3a. But the Second Circuit disagreed with the Third. The Second Circuit concluded that the statute is ambiguous and that the BIA's interpretation is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). App. 7a-12a.

The Second Circuit began by noting that section 1101(a)(43) uses three different methods of identifying the crimes that constitute aggravated felonies. App. 8a. Some crimes, the court observed, are referred to by their generic names, either directly (as with murder and rape, § 1101(a)(43)(A)), or as offenses "relating to" generically named crimes (as in § 1101(a)(43)(S), which refers to offenses "relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness"). App. 8a. Other crimes are referred to as offenses "defined in" a particular federal statute, as in § 1101(a)(43)(B), which refers to "illicit trafficking in a controlled substance (as defined in section 802 of title 21)." App. 8a-9a. And still other crimes are referred to as offenses "described in" a particular federal statute, as in

§ 1101(a)(43)(E), the provision at issue in this case. App. 9a.

The Second Circuit reasoned that "described in" is a broader standard than "defined in," and that an offense "described in" a federal statute "need not reproduce the federal jurisdictional element to have immigration consequences." App. 9a-10a. The court acknowledged that on this point it disagreed with the Third Circuit, which had come to precisely the opposite conclusion—that "defined in" is the broader standard, and that for a state offense to be "described in" a federal statute the state offense must reproduce the federal statute's jurisdictional element. App. 9a (citing *Bautista*, 744 F.3d at 59).

"On the other hand," the Second Circuit continued, "we do not think that this conclusion follows inexorably from the INA's text and structure." App. 10a. The court pointed out that paragraph 43's unnumbered penultimate sentence does not "unequivocally express[] Congress's intent to discount federal jurisdictional elements in determining whether a state offense is 'described in' a federal statute." App. 10a. In response to the government's argument that without such discounting paragraph 43 would capture few, if any, state crimes, the Second Circuit explained that "the penultimate sentence could also be read to make clear that an offense will not be exempted from the definition of an 'aggravated felony' merely because it was a violation of state or foreign, rather than federal, law." App. 11a.

Because the Second Circuit found the statute ambiguous, it accorded *Chevron* deference to the BIA's

interpretation of the statute as set forth in *Matter of Bautista*. App. 12a. This was the very same BIA interpretation that had been rejected as erroneous by the Third Circuit in *Bautista v. Attorney General*.

REASONS FOR GRANTING THE WRIT

This case involves a 6-1 circuit split on the meaning of a key definitional term in a frequently-litigated statute. But much more is at stake. Six circuits have refused to read the statute literally, because in their view the statute would make more sense if it were easier for state offenses to qualify as aggravated felonies. In their view, when Congress used the words "described in," Congress must have meant "similar to what is described in," or "described in, except for the interstate commerce element."

As Justice Holmes explained long ago, however, "[w]e do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). Even if it would have been wiser for Congress to include more state arson convictions as aggravated felonies, "the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985). In recent years the Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249,

253-54 (1992). But some courts are still taking a red pencil to Congress's work.

The Court should grant certiorari, not just to bring uniformity to a key point of immigration law, but to remind the lower courts that they are in the business of interpreting the words enacted by Congress, not divining the purposes of Congress.

I. The circuits are split 6-1 on whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

In six circuits—the Second, Fourth, Fifth, Seventh, Eighth, and Ninth—a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a federal statute, even if the state offense lacks an interstate commerce element that is present in the federal statute. In the Third Circuit, by contrast, a state offense is "described in" a federal statute under § 1101(a)(43) only if the state offense includes all the elements listed in the federal statute, including the interstate commerce element. The Third Circuit has explicitly rejected the view taken by the Fifth, Seventh, Eighth, and Ninth Circuits, while the Second and Fourth Circuits—the most recent circuits to consider the question—have explicitly rejected the view taken by the Third.

A. In the Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits, a state offense is "described in" a federal statute even if the federal statute includes an interstate commerce element that the state offense lacks.

The first Court of Appeals to address this question was the Ninth Circuit in *Castillo-Rivera*, the case that persuaded the BIA to change its mind. The Ninth Circuit held that "the commerce element" of 18 U.S.C. § 922(g) "is merely a jurisdictional basis not essential to whether a state crime is an aggravated felony." *Castillo-Rivera*, 244 F.3d at 1023 (internal quotation marks omitted). The Ninth Circuit provided three reasons for this conclusion.

First, the court discerned that Congress "clearly intended state crimes to serve as predicate offenses," but that "[i]nterpreting the jurisdictional element of § 922(g) to be necessary in order for a firearms conviction to constitute an aggravated felony under § 1101(a)(43)(E)(ii) would reduce the number of state firearms offenses that qualify to no more than a negligible number," because "[r]arely, if ever, would a state firearms conviction specify whether a commerce nexus exists." *Castillo-Rivera*, 244 F.3d at 1023.

Second, the Ninth Circuit noted that the penultimate sentence of § 1101(a)(43) "explicitly includes predicate offenses 'in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.'" *Castillo-Rivera*, 244 F.3d at 1023 n.4. "Needless to say," the

court concluded, "a foreign offense would likely never contain an interstate commerce nexus." *Id.*

Third, the Ninth Circuit observed that the Sentencing Guidelines define "firearms offense" as any offense covered by certain federal statutes "or any similar offense under state or local law." *Id.* at 1024 (internal quotation marks and italics deleted). From this observation, the court deduced that the Guidelines "clearly anticipated that 'similar' state firearms offenses would constitute aggravated felonies under § 1101(a)(43)(E)." *Id.*

For these reasons, the Ninth Circuit concluded that "a state felon in possession offense is not required to include a commerce nexus as one of its elements in order to qualify as an aggravated felony." *Id.*

The Seventh Circuit followed the Ninth, in *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008). *Negrete-Rodriguez* likewise raised the question whether the state offense of unlawfully possessing a firearm is "described in" 18 U.S.C. § 922(g), where the state offense lacks § 922(g)'s interstate commerce element. "We find the Ninth Circuit's reasoning persuasive," the Seventh Circuit declared. "The only purpose of the commerce element of § 922(g)(1) is to obtain federal jurisdiction over the crime. Clearly, Congress did not intend an element not necessary in state law to be the factor determining whether the state offense can be considered the equivalent of a § 922(g)(1) offense." *Negrete-Rodriguez*, 518 F.3d at 502. The Seventh Circuit could be confident that such was Congress's intent,

the court explained, because requiring the elements of the state crime to match the elements of the federal crime, including the interstate commerce element, "would likely eliminate the intended inclusion of most state statutes, since states do not operate under the same jurisdictional constraints as the federal government." *Id.*

The Fifth Circuit followed suit in *Nieto Hernandez v. Holder*, 592 F.3d 681 (5th Cir. 2009), another case involving a comparison of the elements of 18 U.S.C. § 922(g) and the elements of a state offense of unlawful possession of a firearm. Like the Ninth and Seventh Circuits, the Fifth Circuit determined that "Congress intended more than a negligible number of state firearm offenses to be encompassed within § 1101(a)(43)(E)(ii)'s definition of 'aggravated felony,'" and that including the interstate commerce element in the comparison would "undermine that intent." *Nieto Hernandez*, 592 F.3d at 685.

The Eighth Circuit held likewise in *Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012). The Eighth Circuit found that a state racketeering conviction was "described in" 18 U.S.C. § 1962, despite the absence of § 1962's interstate commerce element from the state offense. *Spacek*, 688 F.3d at 538. The court determined that "described in" was a less restrictive construction than "defined in," as used elsewhere in 8 U.S.C. § 1101(a)(43). *Spacek*, 688 F.3d at 538. The Eight Circuit added that "few if any state criminal provisions include a jurisdictional nexus of the sort found in 18 U.S.C. § 1962." *Id.* at 539.

In the decision below, the Second Circuit took this view as well. Unlike the previous four circuits on this side of the split, which found § 1101(a)(43) clear enough that *Chevron* deference was unnecessary, the Second Circuit found the statute ambiguous but then reached the same result by deferring to the BIA under *Chevron*. App. 12a.

The Fourth Circuit joined this side of the split most recently, in *Espinal-Andrades v. Holder*, --- F.3d ---, 2015 WL 268528 (4th Cir. Jan. 22, 2015). The Fourth Circuit explained: "We recognize that the Third Circuit, in a divided opinion, ruled differently on this precise issue. *Bautista*, 744 F.3d at 54. Frankly, we disagree with the majority opinion's analysis and conclusion." *Id.* at *3 n.2.

B. In the Third Circuit, a state offense is "described in" a federal statute only if the state offense includes all the elements listed in the federal statute, including the interstate commerce element.

On the other side of the split stands the Third Circuit. *Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014). Rather than simply assuming that Congress must have intended § 1101(a)(43) to sweep in as many state offenses as possible, the Third Circuit looked carefully at the text of the statute to determine what Congress actually said. *Bautista* involved the identical state statute as in the instant case—attempted arson in the third degree, N.Y. Penal Law §§ 110 and 150.10—so there is a square split between the Second and Third Circuits, and a split un-

der any practical definition of the word between the Third Circuit and the Fourth, Fifth, Seventh, Eighth, and Ninth Circuits. The Second Circuit acknowledged this conflict in the decision below. App. 3a ("The Third Circuit's decision conflicts with interpretations by the Fifth, Seventh, Eighth, and Ninth Circuits of 8 U.S.C. § 1101(a)(43)'s "offense described in" language.").

The Third Circuit began by observing that § 1101(a)(43) refers to crimes in three different ways. It refers to some crimes by their generic names, like "murder" or "theft." *Bautista*, 744 F.3d at 59. It refers to some as offenses "described in" a federal statute. *Id.* And it refers to others as involving conduct "defined in" a federal statute. *Id.* The court recognized that § 1101(a)(43) uses "defined in" when referring to a U.S. Code section that contains a definition. *Id.* In the subsections using "defined in," "the state conviction need not be punishable under that federal statute but need only include the listed criminal conduct, as it is 'defined' by the federal statute." *Id.* The Third Circuit continued: "In contrast, Congress employs 'described in' to classify a state conviction as an aggravated felony when an offense would be punishable under a federal statute because the conduct or state statute of the conviction encompasses the same elements as a federal statute." *Id.*

The Third Circuit agreed with its sister circuits "that the penultimate sentence conveys Congress's intent to qualify more than a negligible number of state convictions as aggravated felonies." *Id.* at 64. But it disagreed with the other circuits' conclusion

that § 1101(a)(43) "evidences Congress's intent to accomplish that objective through the use of 'described in' rather than 'defined in' as a means to always discard jurisdictional elements of federal felonies." *Id.* The Third Circuit pointed out: "If Congress had intended to exclude the jurisdictional element of all federal statutes from the categorical approach analysis, it could simply have included a different penultimate sentence stating that jurisdictional elements should be ignored." *Id.* The court noted that Congress had explicitly made similar exclusions in other parts of § 1101(a)(43), such as the exclusion for offenses below certain monetary thresholds in § 1101(a)(43)(D) and § 1101(a)(43)(M)(i), the exclusion for political offenses in § 1101(a)(43)(F), and the exclusion for first offenses in § 1101(a)(43)(J). *Id.*

The Third Circuit also observed that if Congress had wished to dispense with the jurisdictional element, "Congress also could have defined the offenses embodied in the federal statutes by their generic names rather than by specific statutes," as it did elsewhere in § 1101(a)(43). *Id.* "For instance, in the case of § 844(i), it could have simply left the category open to all explosive materials offenses or at least to all acts of arson. But it did not make such a generic reference: It referred to arson that included a sufficient relationship to interstate commerce." *Id.* The court concluded: "We must assume that Congress was aware of the limits imposed by the Commerce Clause on the reach of the statutes it passes and that it restricted the breadth of § 101(a)(43)(E) [8 U.S.C. § 1101(a)(43)(E)] with the substantive con-

straints of the included jurisdictional elements in mind." *Id.*

For these reasons, the Third Circuit "decline[d] to apply our sister circuits' reasoning." *Id.* at 66. "The bottom line is that § 844(i) does not describe generic arson or common law arson, but arson that involves interstate commerce." *Id.* The Third Circuit scrupulously (and rather artificially) declared that the scope of its decision was restricted to arson, so that strictly speaking its decision did not conflict with those of the Fifth, Seventh, Eighth, and Ninth Circuits, which had considered firearm possession and racketeering, not arson. *Id.* at 62, 66, 67. As a practical matter, however, the decision of the Third Circuit cannot be reconciled with those of the Fifth, Seventh, Eighth, and Ninth Circuits. As the Third Circuit recognized, "[w]hile Bautista's argument has been rejected by several of our sister circuits in regard to offenses described in § 922(g)(1), we find it congruous with the structure of the INA and Supreme Court precedent." *Id.* at 61. In the Third Circuit, a state offense is "described in" a federal statute only if the state offense includes the federal statute's interstate commerce element, but in the other circuits, a state offense is "described in" a federal statute even if the state offense lacks the interstate commerce element. Judge Ambro acknowledged as much in his dissenting opinion in *Bautista*. *Id.* at 73 (Ambro, J., dissenting) (noting that if the Third Circuit were to consider the issue in the context of a firearms offense, the court would be "in the untenable position of either abandoning the logic of the majority's opinion or ruling counter to our sister Circuit Courts").

The Third Circuit concluded: "Congress hand-picked which specific federal criminal statutes it would include" in § 1101(a)(43), "and we must give due weight to such deliberate choices." *Id.* at 68. Congress chose to refer to murder and rape by their generic names, § 1101(a)(43)(A), but it chose to refer to arson by a section of the U.S. Code, § 1101(a)(43)(E)(i). As the Third Circuit noted, "[w]e cannot imagine that Congress took the trouble to incorporate its own statutory scheme ... if it meant [for] courts to ignore it." *Id.* (quoting *Lopez*, 549 U.S. at 58).

The government did not seek rehearing en banc in *Bautista* despite the obvious conflict with the other circuits. This Court is thus the only court that can resolve the conflict.

If George Luna lived just a few miles to the west, across the Hudson River in the Third Circuit, he would be eligible for cancellation of removal, and indeed he would be an extraordinarily strong candidate for it. As long as the Second and Third Circuits are in conflict, lawful permanent residents like Luna are well advised to fly into Newark Airport rather than JFK, and immigration lawyers have every incentive to get their cases before the immigration court in Newark rather than the one in New York. This circuit conflict will have important practical effects until it is resolved.

II. A state offense is "described in" a federal statute only if the state offense includes all the elements of the federal statute, including the interstate commerce element.

The Third Circuit has it right, and the BIA got it right the first time. A state offense is "described in" a federal criminal statute only if the state offense includes all the elements of the federal crime, including the interstate commerce element.

Speakers of ordinary English who are untainted by legal learning would recognize this right away. A concept is "described in" a text only if the text actually depicts that very concept, not some other concept that is similar to it but lacks one of its elements. As the BIA correctly pointed out in its first *Vasquez-Muniz* opinion, dictionaries reflect this understanding of the phrase. *Vasquez-Muniz*, 22 I. & N. Dec. at 1420 (quoting the definitions of "describe" in *Black's Law Dictionary* and *Webster's New International Dictionary*, both of which refute the government's contention that "described in" means "that which is analogous or similar in nature to that which is being compared").

The U.S. Code uses the phrase "described in" in its ordinary English sense. Just to pick one of a great many examples, 18 U.S.C. § 521(a) defines a "criminal street gang" as an organization the members of which engage in "offenses described in subsection (c)." Subsection (c) in turn says: "The offenses described in this section are" certain specified federal crimes. These uses of the phrase "described in" con-

form to ordinary English usage. They refer to specific listed items, not to a vague category of things that resemble a listed item but lack an element of a listed item. There are many other sections of the U.S. Code that use the phrase "described in" in the same way. This issue has now been litigated in seven circuits, and the government has yet to cite a single instance in which the U.S. Code uses the term "described in" to mean "similar to what is described in" or "described in except for one element."

A close analysis of the text of 8 U.S.C. § 1101(a)(43) reinforces this conclusion. If Congress had wished to draft a statute that included ordinary state law arson as an aggravated felony, there would have been several easy ways to do it, all of which Congress used elsewhere, some in this very statute.

First, 8 U.S.C. § 1101(a)(43)(E) could simply have used the generic term "arson," rather than "an offense described in" one of several federal statutes. This was the method Congress used for murder, rape, and sexual abuse of a minor, § 1101(a)(43)(A), and for theft and burglary, § 1101(a)(43)(G).

Second, § 1101(a)(43)(E) could have said "a Federal offense described in" one of the specified federal statutes "or a State offense that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed." This was the method Congress used in 18 U.S.C. § 3142(e)(2)(A), which requires pretrial detention where a "person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in

subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed." *See also* 18 U.S.C. § 3142(f)(1)(D) (using the same method); 18 U.S.C. § 5032 (providing that a juvenile shall be tried as an adult if he "has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed").

Third, instead of stating "an offense *described in*" one of the specified federal statutes, § 1101(a)(43)(E) could have said "an offense *relating to*" the crimes described in those statutes. Congress used this method for offenses "relating to" failure to appear for sentencing, § 1101(a)(43)(Q), offenses "relating to" commercial bribery, counterfeiting, and forgery, § 1101(a)(43)(R), and offenses "relating to" obstruction of justice and perjury, § 1101(a)(43)(S).

Fourth, instead of stating "an offense *described in*" one of the specified federal statutes, § 1101(a)(43)(E) could have said "an offense *substantially similar to*" the crimes described in those statutes. Congress used this method in 21 U.S.C. § 802(32)(A), which defines as unlawful narcotics substances with chemical compositions "substantially similar to" those of certain specified controlled substances.

Fifth, the penultimate sentence of § 1101(a)(43) could simply have said that state offenses count as

aggravated felonies regardless of whether jurisdictional elements are present.

Congress chose each of these alternatives elsewhere, including elsewhere in this very statute, but not in 8 U.S.C. § 1101(a)(43)(E). The obvious inference is that ordinary state law arson is not an aggravated felony.

Moreover, as the Third Circuit correctly pointed out in *Bautista*, 744 F.3d at 68, some of the federal criminal statutes referenced in § 1101(a)(43) have jurisdictional elements other than use in interstate commerce. Calling them "jurisdictional" does not diminish their status as elements; they are as important as any other elements of their respective offenses. For instance, § 1101(a)(43)(E) defines as an aggravated felony "an offense described in" 18 U.S.C. § 844(g), which forbids the possession of an explosive "in an airport that is subject to the regulatory authority of the Federal Aviation Administration." The existence of FAA regulatory authority is an element of the crime to ensure federal jurisdiction, just like the use of property in interstate commerce is a jurisdictional element of federal arson under 18 U.S.C. § 844(i). If a person possessed an explosive in an airport that is *not* subject to FAA regulatory authority, he would surely not be committing "an offense described in" 18 U.S.C. § 844(g), precisely because of the absence of the jurisdictional element.

Or to pick another example, § 1101(a)(43)(H) defines as an aggravated felony "an offense described in" 18 U.S.C. § 876, which forbids the sending of threatening communications "by the Postal Service."

The Postal Service element is in the statute to ensure federal jurisdiction, just like the use of property in interstate commerce is a jurisdictional element of federal arson. If a person sent a threatening communication by semaphore, or by carrier pigeon, or by any medium other than the Postal Service, he would surely not be committing an offense "described in" 18 U.S.C. § 876, again because of the absence of the jurisdictional element. The outcome should be the same for the jurisdictional element of federal arson. An element is an element, regardless of the reason it was inserted in the statute. A court cannot choose to ignore an element of a crime to suit the court's view of sound policy, simply because the element is jurisdictional.

Some of the circuits that have interpreted the statute incorrectly have labored under the misimpression that a literal interpretation of "described in" would render the penultimate sentence of 8 U.S.C. § 1101(a)(43) a near-nullity, because few if any state crimes require a connection to interstate commerce. *Castillo-Rivera*, 244 F.3d at 1023; *Negrete-Rodriguez*, 518 F.3d at 502; *Nieto Hernandez*, 592 F.3d at 685; *Spacek*, 688 F.3d at 538-39. But this view is clearly mistaken. The penultimate sentence merely says that state offenses can qualify as aggravated felonies. It does not say that every single subpart of § 1101(a)(43) must include both federal and state offenses. Under a literal interpretation of "described in," many state offenses—all that are identified by their generic names—would still qualify as aggravated felonies, including murder, rape, and sexual abuse of a minor, § 1101(a)(43)(A); theft and

burglary, § 1101(a)(43)(G); offenses relating to prostitution, § 1101(a)(43)(K)(i); offenses involving fraud and deceit, § 1101(a)(43)(M)(i); forgery and counterfeiting, § 1101(a)(43)(R); and obstruction of justice and perjury, § 1101(a)(43)(S). The penultimate sentence "provides that a generic description" of an offense, "not specifically couched as a state offense or a federal one, covers either one." *Lopez*, 549 U.S. at 57. The penultimate sentence is thus far from a nullity—indeed, it still covers a great number of state offenses—when "described in" is taken to mean "described in."

Some of the circuits that have misinterpreted the statute have drawn an erroneous conclusion from the fact that some subsections of 8 U.S.C. § 1101(a)(43) use the term "defined in," while others use the term "described in." These courts have mistakenly reasoned that "described in" must mean something less precise than "defined in." *See Castillo-Rivera*, 244 F.3d at 1023; *Spacek*, 688 F.3d at 538; App. 9a-10a; *Espinal-Andrades*, 2015 WL 268528 at *3. A close look at the statute, however, reveals a much more plausible reason for the coexistence of the two phrases, one that the Third Circuit correctly elucidated. *See Bautista*, 744 F.3d at 59. Section 1101(a)(43) uses "defined in" only when referring to a federal statute that explicitly provides a *definition* of a term. *See* 8 U.S.C. § 1101(a)(43)(B) (referring to the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)); 8 U.S.C. § 1101(a)(43)(C) (referring to the definitions of "firearm" and "destructive device" in 18 U.S.C. § 921 and to the definition of "explosive materials" in 18 U.S.C. § 841(c)); 8

U.S.C. § 1101(a)(43)(F) (referring to the definition of "crime of violence" in 18 U.S.C. § 16). By contrast, section 1101(a)(43) uses "described in" when referring to a federal statute that *describes* a crime by stating its elements. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(D) (referring to 18 U.S.C. § 1956, which states the elements of money laundering); 8 U.S.C. § 1101(a)(43)(H) (referring to, *inter alia*, 18 U.S.C. § 875, which states the elements of extortion); 8 U.S.C. § 1101(a)(43)(I) (referring to, *inter alia*, 18 U.S.C. § 2251, which states the elements of sexual exploitation of children).

In the court below, the government argued that a literal interpretation of 8 U.S.C. § 1101(a)(43)(E) would render meaningless the clause of 8 U.S.C. § 1231(a)(4)(B)(ii) that authorizes the Attorney General to remove an alien serving a state prison sentence "for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title)." This clause assumes that *some* state offenses must be listed in § 1101(a)(43)(E), but the government errs twice in contending that arson must be one of them. First, § 1231(a)(4)(B)(ii) by its own terms applies only to "a nonviolent offense," but arson is a violent offense. *See, e.g.*, 18 U.S.C. § 924(e)(2)(B)(ii); 18 U.S.C. § 3156(a)(4). Second, § 1101(a)(43)(E) lists many federal criminal statutes, several of which do not contain interstate commerce elements. These include 18 U.S.C. § 922(o) (prohibiting the possession and transfer of machine guns), 18 U.S.C. § 922(p) (prohibiting the possession and transfer of firearms not detectable by metal detectors); 18 U.S.C. § 922(r) (prohibiting the assembly of

certain firearms identical to prohibited firearms); 18 U.S.C. § 924(h) (prohibiting the transfer of firearms to be used in crimes of violence or drug trafficking); and 26 U.S.C. § 5861 (prohibiting a wide range of firearms-related conduct, most of which has no interstate commerce element). These (or at least the nonviolent ones among them) are the offenses referred to in the clause of 8 U.S.C. § 1231(a)(4)(B)(ii) on which the government relies. This clause is thus hardly meaningless when "described in" is taken to mean "described in."[2]

For these reasons, 8 U.S.C. § 1101(a)(43)(E) is not ambiguous, so there is no occasion to accord *Chevron* deference to the BIA. But if there was, the rationale for deferring to the BIA would be at its weakest. When the BIA initially interpreted the statute, in its first opinion in *Vasquez-Muniz*, it determined that a state offense is *not* "described in" a federal statute if the federal statute includes an interstate commerce element that the state offense lacks. *In re Vasquez-Muniz*, 22 I. & N. Dec. 1415 (BIA 2000). The BIA flip-flopped thirteen months later, not because it had developed any new expertise on the topic, but because the Ninth Circuit had reached the opposite result in a poorly reasoned opinion in an unrelated case. *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002). The BIA was, in effect, deferring to the Ninth

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[2] This case is thus easily distinguishable from *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009), in which the Court rejected an interpretation of 8 U.S.C. § 1101(a)(43) that would have left one of its provisions "with little, if any, meaningful application." Under the Third Circuit's correct interpretation of the statute, no provision is consigned to meaninglessness.

Circuit when it changed its view. It makes sense to defer to an agency when the agency is making its own decision in its area of specialization, but it does not make sense to defer to an agency when the agency is merely following what a court has decided, especially when the agency's considered view was exactly the opposite prior to the court decision.

The only real argument in support of the decision below is a nagging sense that Congress could not really have meant what it said in the text of the statute, because the statute, as written, classifies few if any state arson convictions as aggravated felonies. There are three responses to this intuition.

First, it would not have been absurd for Congress to exclude ordinary state arson from the definition of aggravated felony. Many of the acts that constitute ordinary state arson are exceedingly minor. In New York, for example, a person whose cigarette leaves a burn mark on the wall of a residence has committed the felony of third degree arson. A person who merely *tries* to leave a burn mark, but fails, has committed the felony of attempted third degree arson. *See* N.Y. Penal Law §§ 110, 150.10. Congress could reasonably have determined that such minor offenses do not merit expulsion from the country.

Second, we have no way of knowing whether the 535 members of Congress actually intended something different from what they wrote. All we have is the text of the statute. Most likely, no member of Congress gave any thought at all to the number of state arson convictions that would be deemed aggravated felonies for immigration purposes. The penul-

timate sentence of § 1101(a)(43) was added by the Immigration Act of 1990, 104 Stat. 4978, 5048, at a time when the definition of aggravated felony was much simpler and did not include any provisions referring to arson. Section 1101(a)(43)(E) was enacted as part of the Immigration and Nationality Technical Corrections Act of 1994, 108 Stat. 4305, 4320-22. It was not the highest priority on Congress's agenda.

The third and most fundamental response is that a court's nagging sense of what Congress must have meant is utterly irrelevant. If the statute sweeps in fewer arson convictions than a judge thinks is appropriate, it is not the judge's business to rewrite the statute. Every year, Congress enacts statutes that some find anomalous. "But this Court does not revise legislation ... just because the text as written creates an apparent anomaly." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014). It may well be that Congress—if anyone had given the matter more thought—would have wanted to include more state arson convictions as aggravated felonies than Congress actually did include. "The question, however, is not what Congress 'would have wanted' but what Congress enacted." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). What Congress enacted was a statute that excludes most state arson convictions from the definition of aggravated felony. If Congress wants more state arson convictions to be included, then Congress should amend the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals, Second Circuit

JORGE LUNA TORRES, Petitioner,
v.
ERIC H. HOLDER, JR., Attorney General of the United States, Respondent.*

Docket No. 13–2498

Argued: May 5, 2014
Decided: Aug. 20, 2014

Before: SACK, RAGGI, and CHIN, Circuit Judges.

SACK, Circuit Judge:

We consider on this appeal whether a conviction under New York Penal Law §§ 110 and 150.10 for attempted arson in the third degree constitutes an "aggravated felony" under the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1101(a)(43)(E)(i). Answering this question requires us to decide whether this state crime, which lacks a federal jurisdictional element, is an "offense described in" 18 U.S.C. § 844(i), the federal statute governing explosive materials offenses, which does contain such an element. Because we defer to the BIA's reasonable determination that a state "offense described in" 18

* The Clerk of the Court is respectfully directed to amend the caption as set forth above.

U.S.C. § 844(i) need not contain a federal jurisdictional element, we deny the petition.

BACKGROUND

Jorge Luna Torres, a native and citizen of the Dominican Republic and a lawful permanent resident of the United States, was convicted in 1999 of attempted arson in the third degree in violation of New York Penal Law §§ 110 and 150.10. Luna[1] was sentenced to one day of imprisonment and five years of probation.

In 2006, Luna sought admission to the United States as a lawful permanent resident after a trip abroad. On March 13, 2007, the Immigration and Naturalization Service issued a Notice to Appear charging Luna with inadmissibility as an alien convicted of a crime involving moral turpitude.

Luna applied for cancellation of removal. After a merits hearing, a United States Immigration Judge ("IJ") found Luna removable as charged, a conclusion which Luna does not challenge before this Court. Relying on *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011), *overruled by Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014), the IJ also found Luna ineligible for cancellation of removal as a permanent resident convicted of an aggravated felony, *see* 8 U.S.C. § 1229b(a)(3). In *Matter of Bautista*, the Board of Immigration Appeals ("BIA") had concluded that a conviction under the same provision of the New York Penal Law constitutes an aggravated felony under

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[1] Although the removal proceedings employ the petitioner's full name, Jorge Luna Torres, he refers to himself as Jorge Luna. We follow his preference here.

section 101(a)(43)(E)(i) of the INA as an "offense described in" 18 U.S.C. § 844(i). *Matter of Bautista*, 25 I. & N. Dec. at 618–20; see 8 U.S.C. § 1101(a)(43)(E)(i) (codifying INA § 101(a)(43)(E)(i)).

Luna appealed the denial of cancellation to the BIA. He argued that the agency should reconsider *Matter of Bautista* and that, if it did not, the decision should not be applied retroactively to his case. The BIA dismissed Luna's appeal, declining to reconsider *Matter of Bautista* and concluding that its effect was not impermissibly retroactive. Luna timely petitioned this Court for review, repeating both of these arguments.

After briefing but before oral argument in Luna's appeal, the Third Circuit vacated the BIA's ruling in *Matter of Bautista*, concluding that the New York arson statute did not qualify as an aggravated felony because it lacked the federal jurisdictional element. *Bautista v. Attorney Gen.*, 744 F.3d 54, 56 (3d Cir. 2014). The Third Circuit's decision conflicts with interpretations by the Fifth, Seventh, Eighth, and Ninth Circuits of 8 U.S.C. § 1101(a)(43)'s "offense described in" language. *See Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012) (interpreting 8 U.S.C. § 1101(a)(43)(J), relating to racketeering offenses); *Nieto Hernandez v. Holder*, 592 F.3d 681 (5th Cir. 2009) (interpreting 8 U.S.C. § 1101(a)(43)(E)(ii), relating to firearms offenses); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008) (same); *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (same). We therefore requested supplemental briefing, which the parties submitted prior to oral argument.

DISCUSSION

I. Jurisdiction and Standard of Review

This Court lacks jurisdiction to review the BIA's denial of discretionary relief from removal. *See* 8 U.S.C. §§ 1252(a)(2)(B)(ii), 1229b(a). But Luna's claim that his conviction is not an aggravated felony rendering him statutorily ineligible for cancellation of removal raises a question of law which we retain jurisdiction to review, *id.* § 1252(a)(2)(D), and which we evaluate under the principles of deference set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

II. Whether a Violation of New York Penal Law § 150.10 Constitutes an Aggravated Felony Under the INA

On appeal, Luna argues that *Matter of Bautista* was incorrectly decided because Congress intended to define as "aggravated felonies" only those state law crimes encompassing all elements of the federal statute, including so-called "jurisdictional" elements. Because we defer to the BIA's reasonable conclusion to the contrary, we reject this argument.

The Statutory Framework

Under the INA, an alien is ineligible for cancellation of removal if he has been convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(3). The statute defines the term "aggravated felony" by enumerating an extensive catalogue of crimes identified with varying degrees of specificity. *See id.* § 1101(a)(43). The definition's penultimate sentence also provides that

"[t]he term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." *Id.*

Among the offenses included under INA § 101(a)(43)'s definition is "an offense described in" 18 U.S.C. § 844(i). *See* 8 U.S.C. § 1101(a)(43)(E)(i). That section in turn provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both....

18 U.S.C. § 844(i). New York Penal Law § 150.10, under which Luna was convicted, provides that "[a] person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion." N.Y. Penal Law § 150.10(1). The two statutes are substantially similar except that 18 U.S.C. § 844(i) contains one element—that the property destroyed be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce"—which New York Penal Law § 150.10 lacks. The question this appeal poses is whether the New York provision must include this jurisdictional element in order to qualify as an "offense described in" the federal statute.

The BIA's Decision in Matter of Bautista

The BIA confronted precisely this question in *Matter of Bautista*. After determining that New York Penal Law § 150.10 and 18 U.S.C. § 844(i) are substantially similar except for the jurisdictional element, the BIA concluded that its analysis in *Matter of Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002) (en banc), controlled. *Matter of Bautista*, 25 I. & N. Dec. at 618–20.

In *Matter of Vasquez-Muniz*, the BIA decided that a conviction under the California Penal Code for possession of a firearm by a felon constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii) as an "offense described in" 18 U.S.C. § 922(g)(1). *Matter of Vasquez-Muniz*, 23 I. & N. Dec. at 213. The BIA, sitting *en banc*, reasoned that a state crime "described in" a federal crime need not reproduce the federal jurisdictional element. *Id.* The BIA concluded that the penultimate sentence of section 1101(a)(43), which clarifies that the term "aggravated felony" applies to "an offense described in this paragraph whether in violation of Federal or State law" or "the law of a foreign country," expressed a congressional "concern over *substantive* offenses rather than any concern about the jurisdiction in which they are prosecuted." *Id.* at 210 (emphasis added). The BIA also reasoned that, since states rarely include federal jurisdictional language in their criminal statutes, requiring state crimes to reproduce federal jurisdictional elements in order to constitute aggravated felonies would virtually excise state criminal convictions from the ambit of section 1101(a)(43)(E), despite clear language to the contrary. *Id.* at 211 (cit-

ing 8 U.S.C. § 1231(a)(4)(B)(ii), which refers to aliens "in the custody of a State" pursuant to a final conviction for an offense described in 8 U.S.C. § 1101(a)(43)(E)). The same would be true, the BIA concluded, of foreign offenses. *Id.* at 211–12.

Applying this reasoning in *Matter of Bautista*, the BIA found no distinction between the federal jurisdictional element of 18 U.S.C. §§ 844(i) and that of 922(g)(1). *Matter of Bautista*, 25 I. & N. Dec. at 620. The BIA also distinguished the holding of *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000), which emphasized the importance of section 844(i)'s federal jurisdictional element, as "related to the scope of the Federal criminal statute, not the collateral consequences in an immigration case." *Matter of Bautista*, 25 I. & N. Dec. at 621. The BIA therefore concluded that a conviction under New York Penal Law §§ 110 and 150.10 constituted an aggravated felony rendering an alien ineligible for cancellation of removal. *Id.* at 622.

***Our Analysis Under* Chevron**

Chevron requires us to defer to an agency's reasonable interpretation of the statute it administers. *Chevron*, 467 U.S. at 842–44, 104 S.Ct. 2778; *Kar Onn Lee v. Holder*, 701 F.3d 931, 936 (2d Cir. 2012). We must first ask "whether Congress has directly spoken to the precise question at issue[,] ... for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether

the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. We must defer to the BIA's interpretation of the INA unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. 2778.

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Kar Onn Lee*, 701 F.3d at 936 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)) (internal quotation marks omitted). "In interpreting the statute at issue, we consider not only the bare meaning of the critical word or phrase but also its placement and purpose in the statutory scheme." *Id.* (quoting *Holloway v. United States*, 526 U.S. 1, 6, 119 S.Ct. 966, 143 L.Ed.2d 1 (1999)) (internal quotation marks omitted). Considering the language of clause 1101(a)(43)(E)(i) and its place in paragraph 1101(a)(43) and the INA as whole, we conclude that the statute is ambiguous as to whether a state crime must contain a federal jurisdictional element in order to constitute an aggravated felony.

Section 1101(a)'s paragraph 43 identifies crimes that constitute aggravated felonies in three ways. Some are indicated in terms of generic offenses or offenses "relating to" generic offenses. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor"); *id.* § 1101(a)(43)(S) ("an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness"). Others are referred to as offenses "defined in" a particular federal statute. *See, e.g., id.* § 1101(a)(43)(B)("illicit traf-

ficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)"). And still others are denominated offenses "described in" a particular federal statute. *See, e.g., id.* § 1101(a)(43)(E). The provision at issue here belongs in this last category.

Luna contends that, for a state offense to be one that is "described in" a federal statute, the elements of the state and federal crimes, including any jurisdictional elements, must be identical. *See* Pet'r's Br. at 13–17. The Third Circuit took a similar approach in rejecting the BIA's decision in *Matter of Bautista*, concluding that state offenses "described in" a federal statute must reproduce the federal jurisdictional element to constitute aggravated felonies, while offenses "defined in" a federal statute need not.[2] *Bautista*, 744 F.3d at 59.

We are inclined to disagree. It seems to us, as it did to the Fifth, Seventh, Eighth, and Ninth Circuits, that "described in" is the broader standard, and that an offense identified in this way need not reproduce the federal jurisdictional element to have

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[2] The Third Circuit also reasoned that if Congress had intended all state arson crimes to constitute aggravated felonies, it could have written section 1101(a)(43)(E)(i) to refer to the generic offense of arson rather than the federal statute governing explosives offenses. *Bautista*, 744 F.3d at 64. While this argument is not without force, we find at least equally persuasive the counterargument that Congress may have chosen to indicate the covered crimes by referring to 18 U.S.C. § 844 because the explosives offenses detailed therein are broader than generic or common-law arson. *Cf. Negrete-Rodriguez*, 518 F.3d at 503 ("[M]any firearms offenses are not susceptible to being easily described in general terms....").

immigration consequences. *See Castillo–Rivera*, 244 F.3d at 1023 (stating that Congress "'had to use some looser standard such as "described in" rather than the more precise standard of "defined in," if it wanted more than a negligible number of state offenses to count as aggravated felonies'"); *Negrete–Rodriguez*, 518 F.3d at 502, 503 (discussing *Castillo–Rivera*'s distinction between "described in" and "defined in" and rejecting petitioner's argument that "'defined in' and 'described in' are synonymous"); *Nieto Hernandez*, 592 F.3d at 685–86 (citing *Negrete–Rodriguez* and *Castillo–Rivera*); *Spacek*, 688 F.3d at 538 ("Section 1101(a)(43)(J) requires only 'an offense *described in* section 1962 of title 18,' while Congress used the more restrictive construction 'as *defined in*' elsewhere in the statute." (emphases in original)); *see also Bautista*, 744 F.3d at 71 (Ambro, J., dissenting) ("To me, the phrase 'described in' refers broadly to the *type* of offense." (emphasis in original)).

On the other hand, we do not think that this conclusion follows inexorably from the INA's text and structure. We are not fully convinced, for example, that paragraph 43's penultimate sentence unequivocally expresses Congress's intent to discount federal jurisdictional elements when determining whether a state offense is "described in" a federal statute. The BIA has reasoned and the government has argued that the penultimate sentence—which states that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of" federal, state, or foreign law—requires this interpretation, because otherwise section 1101(a)(43)(E) would capture few, if any, state crimes. *See Matter of*

Bautista, 25 I. & N. Dec. at 619–20; Resp't's Br. at 21–24. We think, though, that the penultimate sentence could also be read to make clear that an offense will not be exempted from the definition of an "aggravated felony" merely because it was a violation of state or foreign, rather than federal, law. This reading would not require the result that the government and the BIA appear to have reached. We therefore are not persuaded that the penultimate sentence evinces an unambiguously expressed congressional intent.

The BIA also determined in *Matter of Bautista*, and the government argues on appeal, that reading 8 U.S.C. § 1101(a)(43) to require state offenses to include a federal jurisdictional element renders meaningless another provision of the Immigration and Naturalization Act. *See Matter of Bautista*, 25 I. & N. Dec. at 620 (citing *Matter of Vasquez-Muniz*, 23 I. & N. Dec. at 212); Resp't's Br. at 25. That provision refers to the removal of aliens who are held "in the custody of a State ... pursuant to a final conviction for ... an offense described in" 8 U.S.C. § 1101(a)(43)(E), among other provisions. 8 U.S.C. § 1231(a)(4)(B)(ii). We agree with the BIA and the government that this provision suggests that at least some state offenses must constitute aggravated felonies under subparagraph (E), or there could be no individuals held in state custody pursuant to crimes "described" there. But this fact alone does not compel the conclusion that Congress has spoken unequivocally regarding whether a state offense "described in" 18 U.S.C. § 844(i) must reproduce that statute's jurisdictional element.

Because we conclude that the statute is ambiguous, we owe deference to the BIA's interpretation unless it is unreasonable. *See Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778; *Rotimi v. Holder*, 577 F.3d 133, 139 (2d Cir.2009). As already indicated, we find persuasive the BIA's reading of the relevant statutory provisions as set forth in *Matter of Bautista* and might well adopt it ourselves,[3] were we not constrained to do so in any event by *Chevron*. It is noteworthy, too, that the BIA's interpretation is consonant with the conclusions of the Fifth, Seventh, Eighth, and Ninth Circuits concerning related provisions of paragraph 43. We therefore defer to the BIA's "permissible construction" of section 1101(a)(43)(E)(i).[4] *See Kar Onn Lee*, 701 F.3d at 937.

III. Whether Applying *Matter of Bautista* Is Impermissibly Retroactive

In the alternative, Luna argues that *Matter of Bautista* cannot be applied retroactively to him because the decision represented "such a departure from past practices by the [BIA]" that he lacked no-

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[3] Even if we were to decide that the BIA's reading of the statute is clearly preferable to the Petitioner's, it would not follow that the provision is unambiguous and that Chevron deference is therefore not required. Equipoise is not a precondition to a finding of ambiguity.

[4] For this reason, we reject Luna's argument that the rule of lenity should be applied to his case. *See Adams v. Holder*, 692 F.3d 91, 107 (2d Cir. 2012) (stating that lenity enters only "when none of the other canons of statutory interpretation is capable of resolving the statute's meaning and the BIA has not offered a reasonable interpretation of the statute" (internal quotation marks omitted)).

tice that the state arson crime to which he pled guilty would be deemed an aggravated felony. Pet'r's Br. 30. We see no obstacle to *Matter of Bautista*'s application in Luna's case.

Luna's 1999 conviction postdated the 1996 enactment of 8 U.S.C. § 1101(a)(43). *See Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 126–27 (2d Cir. 2005). In relying on *Matter of Bautista*, the BIA therefore "did not retroactively apply a new law but instead applied [its] determination of what the law 'had *always* meant.'" *De Quan Yu v. U.S. Attorney Gen.*, 568 F.3d 1328, 1333 (11th Cir. 2009) (per curiam) (emphasis in original) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313, n. 12, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994)). Once *Matter of Bautista* issued, "that decision became the controlling interpretation of the law and was entitled to full retroactive effect in all cases still open on direct review, regardless of whether the events predated the ... decision." *Id.* at 1334; *see also Rivers*, 511 U.S. at 312, 114 S.Ct. 1510 ("The essence of judicial decisionmaking—applying general rules to particular situations—necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation."). *Matter of Bautista* therefore governs Luna's case.

CONCLUSION

For the foregoing reasons, we defer to the BIA's determination, which we conclude is reasonable, that a conviction under New York Penal Law §§ 110 and 150.10 constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i), rendering an alien ineligi-

ble for cancellation of removal. Luna's petition is therefore DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

File: A038 495 579 – New York, NY
Date: Jun 4 2013
In re: JORGE LUNA TORRES a.k.a. George Luna
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT: Matthew L. Guadagno, Esquire
CHARGE:
Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] -Crime involving moral turpitude
APPLICATION: Cancellation of removal

The respondent appeals the Immigration Judge's June 12, 2012 decision denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found the respondent removable, as his conviction for 3rd degree attempted arson in violation of sections 110 and 150.10 of the New York Penal Law is for a crime involving moral turpitude (I.J. at 3-4). Moreover, the Immigration

Judge found the respondent ineligible for relief, as the Board has held that this offense constitutes an aggravated felony. *See Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011) (holding that attempted arson in the third degree in violation of sections 110 and 150.10 of the New York Penal Law is an aggravated felony under section 101(a)(43)(E)(i) of the Act, 8 U.S.C. § 1101(a)(43)(E)(i)) (following *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002)).

On appeal the respondent argues that the Board should reconsider its decisions in *Matter of Baustista, supra* and *Matter of Vasquez-Muniz, supra* (Respondent's Br. at 5-12). The Board held in *Matter of Bautista, supra*, that attempted arson in the third degree in violation of sections 110 and 150.10 of the New York Penal Law is an aggravated felony under section 101(a)(43)(E)(i) of the Act, even though the state crime lacks the jurisdictional element in the applicable federal arson offense. *Matter of Bautista, supra*, at 620-21. We noted that the sole difference between the federal arson offense set forth at 18 U.S.C. § 844(i) and the New York state offense is that the federal offense has an additional element, namely, that the property must be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." *Id.* at 620 (citing 18 U.S.C. § 844(i)). We concluded that as this requirement is a "jurisdictional element," our analysis in *Matter of Vasquez-Muniz, supra*, controls. *Id.*

In *Matter of Vasquez-Muniz, supra*, this Board held that state and foreign statutes need not contain a nexus to interstate commerce in order to proscribe an offense "described in" 18 U.S.C. § 922(g)(1). *Matter of Vasquez-Muniz, supra*, at 213. We specifically

held that the alien's offense, possession of a firearm by a felon in violation of section 12021(a)(1) of the California Penal Code, was "described in" section 101(a)(43)(E)(ii) of the Act, and was an aggravated felony, regardless of whether it contained the federal jurisdictional element of affecting interstate commerce contained in 18 U.S.C. § 922(g)(1). *Id.*

The respondent disagrees with our decisions in *Matter of Bautista, supra*, and *Matter of Vasquez-Muniz, supra*, but we are bound to apply these decisions. Moreover, the respondent's appellate arguments do not persuade us that these precedents were wrongly decided (Respondent's Br. at 5-12). Lastly, the respondent contends that *Matter of Bautista, supra*, would have an impermissibly retroactive effect if applied to his conviction, which resulted from a plea agreement entered into before the Board rendered its decision (Respondent's Br. at 12-15). We disagree. The relevant date to consider is the effective date of the aggravated felony provision, not the date of the Board decision. Even assuming our interpretation of what constitutes an aggravated felony could be characterized as a "rule" with potential retroactive effect, there is no presumption against retroactivity and the mere fact that the new rule inured to the detriment of some affected parties cannot be deemed fatal to its validity. *See NLRB v. Bell Aerospace*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK

File: A038-495-579
June 12, 2012

In the Matter of
JORGE LUNA TORRES
RESPONDENT

IN REMOVAL PROCEEDINGS

CHARGES: INA Section 212(a)(2)(A)(i)(I), crime involving moral turpitude.
APPLICATIONS: INA section 240A(a), cancellation of removal for lawful permanent residents.

ON BEHALF OF RESPONDENT: CHRISTOPHER CASSAR
ON BEHALF OF DHS: DANIELLE DUSSEK

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 38-year-old male native and citizen of the Dominican Republic. He became a lawful permanent resident on August 29, 1983 when he was 9 years old. On September 5, 2006, the respondent attempted to enter the United States at John F. Kennedy International Airport as a returning lawful permanent resident. After the Department's records

revealed that the respondent had been convicted of attempted arson in the third degree under New York Penal Law Sections 110 and 150.10, he was issued a Notice to Appear placing him in removal proceedings as an arriving alien. See Exhibit 1. That NTA was filed in the Immigration Court on March 16, 2007. The filing of that document vested the Court with jurisdiction. See 8 C.F.R. Section 1003.14(a).

At a master calendar hearing on March 29, 2007, the respondent appeared with counsel and denied both the factual allegations in the Notice to Appeal and the sole charge of removability. A prior Immigration Judge sustained the charge of removability after finding that the respondent had been convicted of a crime involving moral turpitude and that the factual allegations in the Notice to Appear were true. The Dominican Republic was designated as the country of removal. The issue before the Court is the respondent's application for cancellation of removal for lawful permanent residents under Section 240A(a) of the Immigration and Nationality Act.

REMOVABILITY

Generally, any alien present in the United States who has not been admitted or who arrives at the United States is deemed, for purposes of the Act, to be an applicant for admission. See INA Section 235(a)(1); 8 C.F.R. Section 1240.8(b). However, a lawful permanent resident is not generally treated as an applicant for admission. Although lawful permanent residents are not generally treated as applicants for admission or arriving aliens, there is an exception for aliens described in INA Section 101(a)(13)(C), including those who have committed

an offense identified in INA Section 212(a)(2). See INA Section 101(a)(13)(C)(v). Such individuals are properly regarded as seeking admission to the United States.[1] See Matter of Collado-Munoz, 21 I&N Dec. 1061 (BIA 1997, 1998) (en banc). The Government retains the burden to show by clear and convincing evidence that a lawful permanent resident is an applicant for admission under the statutory criteria. See Matter of Rivens, 25 I&N Dec. 623 (BIA 2011).

In this case, the Department has met its burden by producing a disposition showing that the respondent was convicted of a crime involving moral turpitude under INA 212(a)(2)(A)(i)(I). On June 30, 1999, the respondent pleaded guilty to attempted arson in the third degree in violation of New York Penal Law Sections 110 and 150.10. See Exhibit 3. Under Section 150.10 of the New York Penal Law, a "person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion." The BIA has defined moral turpitude generally to encompass "conduct that shocks the public conscience as being inherently base, vile or depraved and contrary to the accepted rules of morality and the duties owed between persons or to society in general." See Mendez v. Mukasey, 547 F.3d 345, 347 (2d Cir. 2008). Whether a crime is one involving moral turpitude depends on the offender's evil intent or corruption of

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[1] The Supreme Court's decision in Vartelas v. Holder is not application here because the conviction described in the NTA occurred after the enactment of the IIRIRA. See 132 S. Ct. 1479 (2012).

the mind. Matter of Serna, 20 I&N Dec. 579, 581 (BIA 1992). Because a conviction under Section 150.10 requires an intent to damage property, this Court finds that it is a crime involving moral turpitude under INA Section 212(a)(2)(A)(i)(I). See Matter of Bautista, 25 I&N Dec. 616, 618 (BIA 2011). This conclusion establishes both that the respondent was properly charged as an arriving alien and that he was removable as charged in the NTA.

RELIEF FROM REMOVAL

As relief from removal, respondent seeks cancellation of removal for certain permanent residents under INA Section 240A(a). That relief is available to an alien who: a) has been lawfully admitted for permanent residence for not less than five years; b) has resided in the United States continuously for seven years after having been admitted in any status; and c) has not been convicted of an aggravated felony.

Respondent is ineligible for cancellation of removal because he was convicted on an aggravated felony. See Matter of Bautista, 25 I&N Dec. at 618. The BIA's decision in Bautista is dispositive in this case. In Bautista, the BIA held that attempted arson in the third degree in violation of Sections 110 and 150.10 of the New York Penal Law is an aggravated felony under Section 101(a)(43)(E)(i) of the Immigration and Nationality Act. Accordingly, the BIA affirmed the IJ's decision that the respondent was not eligible for cancellation of removal under INA Section 240A(a). This binding precedent governs this case.

Because the respondent is statutorily ineligible for cancellation of removal, the Court will deny his ap-

plication. Respondent has not sought any other form of relief in this case. The Court has independently considered eligibility for other forms of relief and finds that he is not eligible for a waiver under INA Section 212(h) because of his aggravated felony conviction. Similarly, he is not eligible for voluntary departure. The respondent has indicated that he may marry a U.S. citizen in the near future. Even if he does he would require a 212(h) waiver or other waiver in order to adjust his status. As stated earlier, the respondent is not eligible to adjust his status under INA Section 212(h). Further, the respondent's counsel indicated that he may seek a 440 motion in New York State Court. A 440 motion is a collateral attack on an underlying conviction. The respondent's counsel indicated that he may seek that 440 motion on the basis of the Supreme Court's decision in Padilla. However, on April 20, 2011 during a hearing before the undersigned Judge, counsel for the respondent indicated that he already filed a 440 motion in New York State Court and that motion was denied. The Court declines to grant a further continuance for another 440 motion when a first 440 motion was already denied in State Court.

For all the foregoing reasons, the following orders will be entered:

ORDERS

ORDER: The respondent application for cancellation of removal under INA Section 240A(a) is denied.

FURTHER ORDER: The respondent is ordered removed to the Dominican Republic on the charge set forth in the Notice to Appear.

JESSE B. CHRISTENSEN
U.S. Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of November, two thousand fourteen.

Jorge Luna Torres, Petitioner
v.
Eric H. Holder, Jr., Attorney General of the United States, Respondent.

ORDER

Docket No: 13-2498

Petitioner Jorge Luna Torres filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX E

8 U.S.C. § 1101(a)(43):

The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 3121 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 3121 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport

or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprison-

ment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

No. 14-1096

In the Supreme Court of the United States

JORGE LUNA TORRES, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals reasonably concluded that attempted arson in the third degree, in violation of New York Penal Law §§ 110.00 and 150.10, is an aggravated felony under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 764 F.3d 152. The decisions of the Board of Immigration Appeals (Pet. App. 15a-17a) and of the immigration judge (Pet. App. 18a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2014. A petition for rehearing was denied on November 7, 2014 (Pet. App. 24a). On January 16, 2015, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 9, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After records disclosed that petitioner, an alien, had been convicted of attempted third-degree arson in violation of New York Penal Law §§ 110.00 (McKinney 2009) and 150.10 (McKinney 2010), the Department of Homeland Security (DHS) instituted removal proceedings against him. An immigration judge found that petitioner was inadmissible to enter the country based on his conviction and that his conviction qualified as an aggravated felony, making him ineligible for cancellation of removal. Pet. App. 18a-22a. The Board of Immigration Appeals (Board) affirmed that ruling, *id.* at 15a-17a, and the court of appeals upheld the Board's decision, *id.* at 1a-14a.

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines certain serious crimes as "aggravated felonies." 8 U.S.C. 1101(a)(43). An alien "who is convicted of an aggravated felony at any time after admission" into the United States is deportable. 8 U.S.C. 1227(a)(2)(A)(iii). In addition, an alien convicted of an aggravated felony is ineligible for many forms of discretionary relief, including cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C); asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); and voluntary departure, 8 U.S.C. 1229c(b)(1)(C).[1]

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[1] An aggravated felony conviction does not categorically disqualify an alien from obtaining withholding of removal, see 8 U.S.C. 1231(b)(3)(B)(ii), or deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85, see 8 C.F.R. 208.16(d)(2)-(3), 1208.16(d)(2)-(3). Aliens convicted of aggravated felonies are generally barred from seeking readmission following removal, but that bar does not apply if the alien obtains advance consent to apply for readmission. 8 U.S.C. 1182(a)(9)(A)(iii).

The INA specifies that crimes, "whether in violation of Federal or State law," 8 U.S.C. 1101(a)(43), constitute aggravated felonies if they fall within any of a number of categories—most of which are defined in one of three ways. First, crimes are defined as aggravated felonies if they satisfy a generic definition—for example, "murder" or "rape." See 8 U.S.C. 1101(a)(43)(A). Second, crimes are aggravated felonies if they are "defined in" particular provisions of federal law. See, *e.g.*, 8 U.S.C. 1101(a)(43)(B) and (F). Third, crimes are aggravated felonies if they are "described in" particular other provisions of federal law. See, *e.g.*, 8 U.S.C. 1101(a)(43)(D), (E), (H), and (I).

Arson-related offenses are expressly addressed through the last type of aggravated-felony definition—with the INA providing that an alien has convicted of an aggravated felony if the alien has been convicted of any "offense described in" 18 U.S.C. 844(i), the federal arson statute. 8 U.S.C. 1101(a)(43)(E). The federal arson statute, in turn, makes it a crime to "maliciously damage[] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building, vehicle, or other * * * property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. 844(i).

New York's third-degree arson statute parallels the federal provision. The substantive statute makes it a crime to "intentionally damage[] a building or motor vehicle by starting a fire or causing an explosion," N.Y. Penal Law § 150.10(1) (McKinney 2010), and another subsection makes it a crime to attempt the same offense, *id.* § 110.00 (McKinney 2009). These statutes do not apply if the defendant owned

the property at issue or the lawful owner consented to the defendant's conduct, so long as the defendant intended only to destroy the property for a lawful purpose and the defendant had no reasonable ground to believe his conduct might endanger others or damage another building or vehicle. *Id.* § 150.10(2) (McKinney 2010). The New York statutes bar only conduct that is forbidden under the federal arson statute, except that the New York statutes do not contain the jurisdictional element in the federal arson statute, which ensures that the provision constitutes a valid exercise of the federal Commerce Clause power. See Pet. App. 5a (identifying jurisdictional element as the difference between the statutes); *id.* at 16a (identifying jurisdictional element as "the sole difference" between federal and state arson statutes).

2. Petitioner, a native and citizen of the Dominican Republic, is a lawful permanent resident of the United States. Pet. App. 2a. He was convicted in 1999 of attempted third-degree arson in violation of New York Penal Law §§ 110.00 (McKinney 2009) and 150.10 (McKinney 2010). *Ibid.*; Certified Administrative Record (C.A.R.) 127. According to records before the Board, petitioner was originally charged with arson, grand larceny, possession of burglary tools, and other offenses, and his guilty plea to attempted arson reflected a plea bargain. C.A.R. 130. In his state plea colloquy, petitioner did not provide an account of the facts making him guilty of attempted arson. C.A.R. 214-219. Petitioner was sentenced to one day of imprisonment and five years of probation. Pet. App. 2a; C.A.R. 127.

In 2006, after a trip to the Dominican Republic, petitioner sought reentry to the United States at a port

of entry. C.A.R. 125-126. After a database query disclosed petitioner's conviction for attempted arson, petitioner was charged with being inadmissible to the United States because of that conviction. Pet. App. 18a-19a; C.A.R. 126, 383-385.

3. a. In the subsequent removal proceedings, immigration judges found that petitioner's attempted-arson offense made him inadmissible into the United States and ineligible for cancellation of removal. First, an immigration judge determined that petitioner had been convicted of attempted arson and that petitioner's conviction made him inadmissible into the United States. C.A.R. 71-78; see also Pet. App. 19a-21a. Second, an immigration judge determined that petitioner was ineligible for cancellation of removal, relying on a precedential Board decision that convictions for attempted third-degree arson in violation of New York law are aggravated felonies. Pet. App. 21a-23a (discussing *In re Bautista*, 25 I. & N. Dec. 616 (B.I.A. 2011), vacated and remanded, 744 F.3d 54 (3d Cir. 2014)).

b. The Board dismissed petitioner's appeal in an unpublished order. Pet. App. 15a-17a. The Board rejected petitioner's argument that his arson offense was not an aggravated felony because he was convicted under a state statute that "lacks the jurisdictional element in the applicable federal arson offense." *Id.* at 16a. The Board found the question controlled by its decision in *Bautista*, because that decision had held that a conviction under the state arson statute under which petitioner was convicted qualified as an aggravated felony when the sole difference between the state and federal arson statutes was the absence of "the jurisdictional element applicable in the federal

arson offense." *Ibid.* (citing *Bautista*, 25 I. & N. Dec. at 620-621). The Board also relied on *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (B.I.A. 2002), which had concluded that "state and foreign statutes need not contain a nexus to interstate commerce" in order for violations to qualify as aggravated felonies because they are offenses "'described in' 18 U.S.C. 922(g)(1)," the federal statute forbidding felons from possessing firearms. *Id.* at 16a. "[T]he respondent's appellate arguments," the Board wrote in petitioner's case, "do not persuade us that these precedents were wrongly decided." *Id.* at 17a.

4. The court of appeals denied a petition for review, Pet. App. 1a-14a, "defer[ring] to the [Board's] reasonable determination that a state 'offense described in' 18 U.S.C. 844(i) need not contain a federal jurisdictional element," *id.* at 1a-2a.

The court of appeals took as its starting point the Board's published decisions in *Bautista* and *Vasquez-Muniz*. The court explained that those decisions had relied on textual indicators to conclude that state convictions for attempted arson and for possessing a firearm following a felony conviction were offenses described in the federal arson statute and the federal felon-in-possession statute, although the federal statutes (but not the state statutes) had jurisdictional elements requiring a link to interstate commerce. Pet. App. 6a (citations omitted). The Board had noted that the INA states that "the term 'aggravated felony' applies to 'an offense described in this paragraph whether in violation of Federal or State law' or 'the law of a foreign country.'" *Ibid.* (citation omitted). The Board took that language to indicate that the definition of "aggravated felony" "expressed a con-

gressional 'concern over *substantive* offenses rather than any concern about the jurisdiction in which they are prosecuted.'" *Ibid.* (quoting *Vasquez-Muniz*, 23 I. & N. Dec. at 210).

The court of appeals further explained that the Board had noted that 8 U.S.C. 1231(a)(4)(B)(ii) sets forth rules concerning aliens who were "in the custody of a State" based on state convictions for "offenses described in" the federal felon-in-possession statute, federal arson statute, or other enumerated federal provisions. Pet. App. 6a-7a. The Board reasoned that since States "rarely include federal jurisdictional language in their criminal statutes, requiring state crimes to reproduce federal jurisdictional elements in order to constitute aggravated felonies would virtually excise state criminal convictions from the ambit of [S]ection 1101(a)(43)(E), despite [the] clear language" in 8 U.S.C. 1231(a)(4)(B)(ii) referring to individuals in state custody based on state offenses "described in" the relevant federal provisions. Pet. App. 6a (citing *Vasquez-Muniz*, 23 I. & N. Dec. at 211).

After recounting this reasoning by the Board, the court of appeals concluded that the Board's conclusion that attempted arson in violation of the New York statutes is an aggravated-felony reflected a reasonable construction of an ambiguous term within the INA. Pet. App. 7a-12a. The court noted that it was required "to defer to an agency's reasonable interpretation of the statute it administers." *Id.* at 7a (citing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984)). Here, after "[c]onsidering the language of clause 1101(a)(43)(E)(i) and its place in paragraph 1101(a)(43) and the INA as a whole," the court concluded that Congress had not

spoken directly to "whether a state crime must contain a federal jurisdictional element in order to constitute an aggravated felony." *Id.* at 8a. The court drew meaning from the language and structure of the aggravated-felony definition. It emphasized the contrasting language Congress used elsewhere in the INA's aggravated-felony definition, specifying that aggravated felonies include offenses "defined in" certain provisions and offenses "described in" certain other provisions. *Id.* at 8a-9a. This naturally suggested, the court noted, that Congress meant for the two terms to have different meanings. And the court wrote that "[i]t seems to us, as it did to the Fifth, Seventh, Eighth, and Ninth Circuits, that 'described in' is the broader standard, and that an offense identified in this way need not reproduce the federal jurisdictional element to have immigration consequences." *Id.* at 9a-10a (citations omitted).

The court of appeals looked to several other sources as relevant in finding that the Board was reasonable in construing the aggravated felony provision concerning arson to cover petitioner's state offense. The court noted that the Board's interpretation aligned "with the conclusions of the Fifth, Seventh, Eighth, and Ninth Circuits concerning related provisions of" 8 U.S.C. 1101(a)(43). Pet. App. 12a. And the court noted that the Board had also relied on other sentences in the statute to support its reading. See *id.* at 10a-11a (discussing 8 U.S.C. 1101(a)(43)(E) and 8 U.S.C. 1231(a)(4)(B)(ii)). While the court stated that in its view those additional portions of the text did not unequivocally compel the Board's statutory construction, it found "persuasive" the Board's construction and stated that it "might well adopt" that construction

if the case were not viewed through the lens of *Chevron*. *Ibid.* At a minimum, the court concluded, the Board's approach reflected a "'permissible construction' of section 1101(a)(43)(E)(i)." *Id.* at 12a. The court therefore declined to disturb the Board's conclusion that petitioner's state arson conviction was for an aggravated felony. *Id.* at 13a-14a.

ARGUMENT

Petitioner renews his contention (Pet. 11-12, 22-31) that his conviction for attempted arson in violation of New York law does not constitute an aggravated felony. The court of appeals correctly rejected that contention. And this Court's intervention on that question, which has only recently been the subject of any judicial consideration, would be premature.

1. The court of appeals correctly upheld the Board's determination that petitioner's state arson conviction was for an aggravated felony. The Board adopted the best reading—and certainly a permissible reading—of the relevant portion of the INA's aggravated-felony definition when it concluded that an alien convicted of an arson offense in violation of a state statute with every substantive element of the federal arson statute, but not the federal jurisdictional element, has committed an "offense described in" the federal arson provision.

First, as a matter of background principles, courts have long distinguished between substantive elements (that define the *actus reus*) and jurisdictional elements (which limit a sovereign's ability to prosecute it). An element requiring a connection to interstate commerce, such as that contained in the federal arson statute, is the latter—a "term[] of art connecting the congressional exercise of legislative authority with the

constitutional provision (here, the Commerce Clause) that grants Congress that authority." *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 17-18 (2006) (citing *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995); *Russell* v. *United States*, 471 U.S. 858, 859 (1985)). A jurisdictional element "may limit, but it will not primarily define, the behavior that the statute calls a 'violation' of federal law." *Ibid.* The Board's treatment of convictions under state arson statutes identical to federal arson in all respects except for the interstate-commerce element appropriately reflects that interstate nexus is "not a substantive element of the offense, but [one that] arises only from 'constitutional limitations on congressional power over intrastate activities under the Commerce Clause.'" *United States* v. *Blackmon*, 839 F.2d 900, 907 (2d Cir. 1988); *United States* v. *Bryant*, 766 F.2d 370, 375 (8th Cir. 1985) (same), cert. denied, 474 U.S. 1054 (1986).

Second, the operative language in the INA's aggravated-felony definition strongly supports the Board's interpretation. The aggravated-felony definition provides that offenses are aggravated felonies if they are "described in" certain federal provisions or "defined in" certain other provisions. 8 U.S.C. 1101(a)(43). As courts of appeals have uniformly recognized, the contrasting language within this single definition suggests that "defined in" and "described in" carry different meanings. And the term "described in" is a "looser" one than the term "defined in"—as dictionaries reflect. See *Espinal-Andrades* v. *Holder*, 777 F.3d 163, 168 (4th Cir.) (noting that dictionary definition of "describe" includes "[t]o convey an idea or impression of" or "[t]o trace the form or outline of"), petition for

cert. pending, No. 14-1268 (filed Apr. 22, 2015). Petitioner disregards the principle that different words in the same provision should be given different meanings, by treating "defined in" and "described in" as having identical effects—each requiring that a state offense meet each prong of a federal definition (including any jurisdictional element).[2]

The surrounding text reinforces the conclusion that a state arson offense identical to federal arson except for the jurisdictional element is an offense "described in" the federal arson provision. Both the meaning of statutory terms, and their "plainness or ambiguity," are to be "determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole." *Yates* v. *United States*, 135 S. Ct. 1074, 1081-1082 (2015) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (alteration marks omitted). Here, in the text following the operative definitional provision, Congress stated that its aggravated-felony definition was meant to reach state crimes. 8 U.S.C. 1101(a)(43) (stating that term "aggravated felony" applies to any "offense described in this paragraph whether in violation of Federal or State law"). And a related INA provision expressly contemplates that state offenses would qualify as aggravated felonies under Section 1101(a)(43)(E)—a

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[2] Petitioner's observation that that the *objects* of those phrases are different (Pet. 27-28) does not give "defined in" and "described in" different meanings, as needed to accord with the presumption that different words in a single provision carry different meanings. That is because on petitioner's view, the alternating "defined in" and "described in" phrases both require that a statute of conviction exactly satisfy a federal definition.

provision that discusses *only* crimes that are "described in" enumerated federal provisions. See 8 U.S.C. 1231(a)(4)(B)(ii) (setting out rules concerning aliens "in the custody of a State" based on convictions for "an offense described in" Section 1101(a)(43)(C) or (E)). While these provisions would not be entirely without effect under petitioner's view, because a few federal crimes referenced in Section 1101(a)(43)(E) have no interstate-commerce element, see Pet. 28-29, these statutory provisions reinforce the other textual indicators (and the background principles) indicating that whether a particular *actus reus* is prosecuted under federal or state law ought not to affect its classification under the INA.

Petitioner's reading, moreover, creates absurdities. Petitioner cannot explain why, when an alien is convicted of arson, the immigration consequences of his offense should turn on whether the alien was prosecuted under a federal statute or under a state statute that is indistinguishable except for the absence of an interstate-commerce jurisdictional element. Neither the seriousness of the crime nor the danger posed differs if a defendant sets fire to a residence that is a rental unit, see *Russell*, 471 U.S. at 858 (interstate-commerce element satisfied), rather than an owner-occupied unit, see *Jones* v. *United States*, 529 U.S. 848 (2000) (interstate-commerce element not satisfied). Nor can petitioner explain why the immigration consequences for a felon convicted of possessing a firearm should turn on whether the state prosecutor proved the firearm was manufactured outside the State in which it was possessed or was otherwise transported in interstate commerce. See 18 U.S.C. 922(g).

Petitioner's lone attempt to place the disparities he advocates on a rational footing is his statement (Pet. 30) that "it would not have been absurd for Congress to exclude ordinary state arson from the definition of aggravated felony," because "[i]n New York," he asserts, "a person whose cigarette leaves a burn mark on the wall of a residence has committed the felony of third degree arson." Insofar as petitioner is suggesting that the New York's arson statute reaches conduct that is less serious than the conduct prohibited under federal law, he misunderstands the relationship between New York's law and the federal arson statute. The Board and the courts of appeals have uniformly concluded that the New York and federal arson statutes are identical in scope, except for the federal statute's jurisdictional element. Thus, if a person who intentionally starts a fire that leaves a burn mark on another person's home or vehicle violates New York's prohibition on deliberately "starting a fire or causing an explosion" that "intentionally damages" another person's home or vehicle, New York Penal Law § 150.10 (McKinney 2010), then that alien's conduct *also* violates the federal prohibition on "maliciously damag[ing] * * * by means of fire or an explosive, any building [or] vehicle," so long as the building or vehicle in question was "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 18 U.S.C. 844(i). Indeed, petitioner himself has not previously disputed that the statutes are identical except for a federal jurisdictional element that even petitioner does not suggest has any bearing on culpability, danger, or any similar concern.

At a minimum, given the textual and structural support for the Board's view, and the absurd conse-

quences that would follow from petitioner's reading, the Board's construction reflects a permissible construction of the portion of the aggravated-felony definition addressing arson. As courts considering this provision have recognized, and petitioner does not dispute, the Board's construction of Section 1101(a)(43)(E)(i), is appropriately evaluated under the framework of *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because the Board's constructions of INA terms are judged under that deferential framework. See, *e.g.*, *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); see also *id.* at 2214 (Roberts, C.J., concurring in the judgment).

Petitioner asserts (Pet. 29-30) that the Board's views should receive reduced respect because the Board itself "in effect, deferr[ed] to the Ninth Circuit," in construing Section 1101(a)(43)(E), but his argument misunderstands the Board's decisions. While the Board modified its construction of the aggravated-felony definition concerning offenses "described in" 18 U.S.C. 922(g) following consideration of a Ninth Circuit decision, the Board's ultimate decision was based on statutory text and structure—with an emphasis on Sections 1101(a)(43)(E) and 1231(a)(4)(B)(ii). See *In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 210 (B.I.A. 2002); see also *id.* at 212 (stating after statutory analysis that "the Ninth Circuit arrived at the same conclusion we reach here for many of the same reasons enunciated above"). Similarly, the Board decision construing the specific subparagraph of Section 1101(a)(43)(E) at issue here relied on the subparagraph's language, surrounding statutory provisions, consideration of statutory purpose, and an

analysis of the federal arson statute. See *In re Bautista*, 25 I. & N. Dec. 616, 619-620 (B.I.A. 2011), vacated and remanded, 744 F.3d 54 (3d Cir. 2014).

Petitioner's several additional arguments do not undercut the reasonableness of the Board's construction. Petitioner principally argues that the Board is not free to disregard the statutory text, but he fails to recognize that the Board's construction reflects a permissible reading of the statutory language. See, *e.g.*, *Espinal-Andrades*, 777 F.3d at 168 (noting that Board's construction comports with dictionary definition). Indeed, the Board's reading is the most natural one, in light of the contrasting "described in" and "defined in" language. Pet. App. 9a (agreeing with "the Fifth, Seventh, Eighth, and Ninth Circuits" that "described in" appears to be a "broader" standard than "defined in").

Nor is petitioner correct in contending that his reading of the statute is compelled because Congress could have achieved the construction the Board has adopted through other language. While there may be many formulations that could convey any given statutory meaning, none of the alternative formulations Congress actually used in the aggravated-felony provision would have achieved the present meaning with equal clarity. Petitioner suggests (Pet. 23) that Congress "could simply have used the generic term 'arson,'" but because arson's substantive elements vary among jurisdictions and have changed considerably over time, the reference to Section 844(i) is considerably more precise. See, *e.g.*, 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.3, at 239 (2d ed. 2003) (noting that common-law arson was limited to "the malicious burning of the dwelling house of another"

and that arson now "usually is defined by a statutory formulation bearing little resemblance to the common law crime"); *United States* v. *Whaley*, 552 F.3d 904, 906 (8th Cir. 2009).

Petitioner likewise cannot draw support from other provisions in the criminal code, enacted a decade before the aggravated-felony definition, that refer to state crimes that would have been federal offenses "if a circumstance giving rise to federal jurisdiction had existed." Pet. 23-24 (discussing 18 U.S.C. 3142(e)(2)(A) and (f)(1)(D)). There is a "well-established canon of statutory interpretation that the use of different words or terms *within a statute* demonstrates that Congress intended to convey a different meaning for those words," *Spencer Enters., Inc.* v. *United States*, 345 F.3d 683, 689 (9th Cir. 2003) (emphasis added)—the principle implicated by Congress's alternating uses of "described in" and "defined in" within the INA's single aggravated-felony definition. But there is no such principle with respect to Congress's use of different words in unrelated statutes, let alone unrelated statutes enacted by different Congresses, a decade apart. Cf. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4320 (enacting relevant aggravated-felony definitions in INA; Bail Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. I, § 203(a), 98 Stat. 1976 (enacting cited bail provisions).

2. While a shallow division of authority has arisen since courts began to address the aggravated-felony classification of state arson offenses under 8 U.S.C. 1101(a)(43)(E) last year, this Court's intervention would be premature. In the first appellate decision addressing the issue, the Third Circuit held last year

that the INA forecloses classification of state arson convictions as aggravated felonies under Section 1101(a)(43)(E)(i) when the convictions arise under state statutes that lack the federal interstate-commerce jurisdictional element, even if the conduct covered by those statutes otherwise satisfies the federal arson definition. *Bautista*, 744 F.3d at 68. The panel distinguished appellate decisions holding that firearms-related convictions under state statutes lacking an interstate-commerce jurisdictional element may constitute aggravated felonies under Section 1101(a)(43)(E)(ii). The court wrote that "the rationale that our sister circuits have developed in applying the categorical approach to" firearms offenses "under § 101(a)(43)(E)(ii) has limited import to our categorical approach to" arson offenses "under § 101(a)(43)(E)(i)" because gun and arson offenses are "distinct categories of aggravated felonies and that distinction bears on the application of the subsection." *Id.* at 62. The Third Circuit explained that in its view, arson and firearms offenses present different considerations because "the jurisdictional element of § 844(i) substantially narrows the range of arson criminalized therein" and "does more than provide a jurisdictional hook for Congress." *Id.* at 65-66. In view of this distinction, the court concluded that "even if we accept our sister circuits' application of the categorical approach to Section 922(g)(1)," setting out firearm-related crimes, it would not apply that approach to state arson convictions. *Id.* at 66.

In recent months, two court of appeals—the court below and the Fourth Circuit—have disagreed with that holding, affirming the Board's approach to state arson offenses under the INA. Several months after

the decision below, in which the Second Circuit deferred to the Board's approach to state arson offenses as reasonable under *Chevron*, see Pet. App. 1a-14a, the Fourth Circuit affirmed the Board's approach on the ground that a conviction under a state statute that mirrors federal arson in all respects but its jurisdictional element "unambiguously qualifies as an aggravated felony," and that "if any ambiguity existed, the BIA's interpretation was reasonable" under *Chevron*. *Espinal-Andrades*, 777 F.3d at 169.

This Court's intervention in this months-old disagreement would be premature. First, as petitioner acknowledged below, the legal question presented here is not one of broad practical importance, because many arson convictions qualify as aggravated felonies under a distinct definitional provision. See Pet. C.A. Br. 29 (stating that adoption of petitioner's view "would have a very limited impact" because many arsons qualify as aggravated felonies under the crime-of-violence provision, 8 U.S.C. 1101(a)(43)(F)).

Second, the debate on this question is nascent. Only three courts of appeals have considered the classification of state arson offenses under the INA, all in recent opinions. And the shallow disagreement stemming from the *Bautista* decision does not support pretermitting development of this issue. Far from representing an entrenched disagreement, the outlier *Bautista* decision—which drew the support of a single member of the relevant court of appeals—has only just now become an appropriate candidate for that court's en banc review. See 744 F.3d at 56-69 (opinion of one Third Circuit judge and one visiting judge); *id.* at 69-74 (dissenting opinion of Third Circuit judge). That is, since *Bautista* was the first decision of any

court to address the aggravated-felony classification of arson crimes, and it expressly distinguished the cases addressing the aggravated-felony status of firearms offenses, *Bautista* did not—when decided—"conflict[] with the authoritative decisions of other United States Courts of Appeals," Fed. R. App. P 35(b)(1)(B), nor with decisions of this Court or the Third Circuit itself.[3] That has changed as a result of the decision below (and the subsequent *Espinal-Andrades* decision). Yet the Third Circuit has not yet had the opportunity to consider en banc review of the "described in" language in 8 U.S..C. 1101(a)(43)(E), as it could do in a case involving, *e.g.*, the closely related question of the classification of firearms offenses under Section 1101(a)(43)(E). Indeed, the dissenting panel member below suggested that a case involving that provision would force that court to confront the panel's reasoning anew. See *Bautista*, 744 F.3d at 73 (Ambro, J., dissenting) (explaining that consideration of that related question would require the court to "either abandon[] the logic of the majority's opinion" or to adopt a rule that conflicts with the holdings of other circuits). Under these circumstances, there is not now a disagreement that requires this Court's intervention.

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[3] Petitioner acknowledged as much below, where he described *Bautista* as "the first Court of Appeals decision to address' the classification of arson offenses under the INA and distinguished other cases as not addressing arson-specific case law. 13-2498 Docket entry No. 68, at 3-4 (May 1, 2014).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 14-1096

In the Supreme Court of the United States

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v.

LORETTA E. LYNCH,

Respondent.

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REPLY BRIEF FOR PETITIONER

The government concedes (BIO 16-18) that the lower courts are in conflict on the question presented. The government errs, however, in calling the conflict "nascent" (BIO 18), a mistake caused by the government's failure to mention four of the seven circuits involved. On the merits, the government persists (BIO 9-16) in a non-literal interpretation of the statute under which "described in" somehow means "described in, except for one of the elements." The Court should grant certiorari and reverse.

I. This 6-1 circuit conflict warrants immediate review.

As our certiorari petition explained, seven circuits have addressed the Question Presented: Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks. Six of the seven have mistakenly answered yes, on the theory that Congress must have intended something other than what the statute actually says. Pet. App. 1a-14a; *Espinal-Andrades v. Holder*, 777 F.3d 163 (4th Cir. 2015), *pet. for cert. pending*, No. 14-1268 (filed Apr. 22, 2015); *Nieto Hernandez v. Holder*, 592 F.3d 681 (5th Cir. 2009); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008); *Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012); *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001), *cert. denied*, 534 U.S. 931 (2001). Only the Third Cir-

cuit has read the statute literally and answered no. *Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014).

The Brief in Opposition does not even mention the earliest four of these cases, from the Fifth, Seventh, Eighth, and Ninth Circuits. These cases involved state offenses other than arson, but the Question Presented is the same for any state offense, because it would be impossible for "described in" to have different meanings for different state offenses. The Third Circuit's *Bautista* decision was not, as the government would have it (BIO 16), "the first appellate decision addressing the issue." It was the fifth. The conflict on the Question Presented did not begin "in recent months" with the decision below (BIO 17). It began in February 2014 with *Bautista*, in which the Third Circuit explicitly "decline[d] to apply our sister circuits' reasoning." *Id.* at 66. *Bautista* created a 4-1 conflict among the circuits. Now the tally is up to 6-1, because the Second and Fourth Circuits have both explicitly rejected *Bautista*. Pet. App. 3a, 9a; *Espinal-Andrades*, 777 F.3d at 168 n.2.

There is nothing "nascent" about this conflict; it is fully developed and ready for review. The issue has been thoroughly litigated in seven circuits and in the Board of Immigration Appeals, which has come out both ways. Pet. 4-7. There is nothing left to be said on either side. It is particularly ironic that the government should assert that "the Third Circuit has not yet had the opportunity to consider en banc review" (BIO 19), as the government was the losing party in *Bautista* yet did not seek en banc review.

The issue is very important. The definition of "aggravated felony" is one of the most frequently-litigated provisions of immigration law, because so many significant consequences—including deportation, eligibility for asylum, and eligibility for cancellation of removal—turn on whether a particular offense is an aggravated felony. Pet. 2. Nearly half the offenses listed in the long statutory definition of "aggravated felony" include the phrase "described in." This issue affects a large number of people.

The conflicts between contiguous circuits make forum-shopping practically inevitable. Non-citizens can enter the country in the Third Circuit rather than the Second or the Fourth simply by flying into Newark rather than JFK and Philadelphia rather than Baltimore. By moving to New Jersey or Pennsylvania, some lawful permanent residents can render themselves nonremovable. Likewise, the government can choose to detain non-citizens outside the Third Circuit so they will be deemed aggravated felons. This conflict will have real consequences until the Court puts it to rest.

II. The government's non-literal interpretation of the statute is no more persuasive than ever.

The government has defended a non-literal reading of the statute for several years—before the BIA, in seven circuits, and now in its Brief in Opposition in this case. The argument has not improved with age. After all these years, the government has still not pointed to a single instance, either in the U.S. Code or in ordinary English usage, in which "de-

scribed in" means "described in except for one element," or "similar to what is described in." Nor does the government even bother to address the other textual arguments in the certiorari petition, except to make the remarkable claim (BIO 16) that Congress's use of a phrase in one statute does not suggest that Congress could also have used the phrase in another statute.

Instead, the government clings to the last resort of the anti-textualist—the contention that a literal reading of the statute would create "absurdities" (BIO 12), "disparities" (BIO 13), and "absurd consequences" (BIO 13-14). Despite the government's repeated use of the plural, the Brief in Opposition identifies only one ostensible absurdity or disparity, the fact that the statute defines federal arsons but not most state arsons as aggravated felonies. But this is no absurdity at all. Minor arson offenses are normally prosecuted by the states, not by the federal government. It would hardly have been absurd for Congress to exclude such minor arsons from the definition of aggravated felony. To be sure, some state arsons are more serious, and occasional federal arsons may be minor. But the question is not whether Congress designed a perfect mechanism for separating major from minor arsons. The question is whether a literal reading of the statute would be too absurd to contemplate. It would not.

Nor can the government's non-literal reading be rescued by supposing (BIO 15-16) that "arson" would have been too vague a word for Congress to use if it really wanted to include arson as an aggravated felony. The government imagines (BIO 15) that the def-

inition of arson varies so widely among jurisdictions that the word is now too ambiguous to use in federal statutes. In fact, however, the word "arson" appears several times in the U.S. Code without confusing anyone. *See, e.g.*, 15 U.S.C. § 2220(1) (directing the Federal Emergency Management Agency to develop "arson control techniques"); 18 U.S.C. § 1111(a) (defining first degree murder to include murder committed during "any arson"); 18 U.S.C. § 3559(c)(2)(B) (defining arson for sentencing purposes). When Congress wants to say "arson," it says "arson."

Moreover, the supposed ambiguity of generic names for crimes did not stop Congress from using other generic names for crimes in the definition of aggravated felony, including "murder" and "rape," 8 U.S.C. § 1101(a)(43)(A), as well as "theft" and "burglary," § 1101(a)(43)(G). If Congress had wanted to classify all state arsons as aggravated felonies, as it did for these other crimes, it would have used the word "arson."

But Congress did not say "arson." Instead, Congress said "an offense described in" 18 U.S.C. § 844(i), a statute that "is not soundly read to make virtually every arson in the country a federal offense," *Jones v. United States*, 529 U.S. 848, 859 (2000), because it prohibits the burning only of property "used in interstate or foreign commerce." A court cannot ignore Congress's choice of words, even if the court believes a contrary choice would have been more sensible.

Finally, the government's invocation of *Chevron* deference (BIO 14) is doubly mistaken—first because

the text of the statute is not ambiguous, and second because the statute has both civil and criminal applications. *See, e.g.*, 8 U.S.C. § 1326(b)(2) (providing enhanced criminal penalties for reentry by an alien convicted of an "aggravated felony"). Indeed, if the text of the statute were ambiguous, it would have to be interpreted in George Luna's favor under the rule of lenity. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

CONCLUSION

The petition for a writ of certiorari should be granted.

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QUESTION PRESENTED

Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

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BRIEF FOR PETITIONER

Petitioner Jorge Luna Torres respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is published at 764 F.3d 152 (2d Cir. 2014) and appears at Pet. App. 1a. The opinion of the Board of Immigration Appeals is unpublished and appears at Pet. App. 15a. The opinion of the Immigration Judge is unpublished and appears at Pet. App. 18a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on August 20, 2014. The Court of Appeals denied a timely petition for rehearing en banc on November 7, 2014. Pet. App. 24a. On January 16, 2015, Justice Ginsburg extended the time to file a petition for certiorari until March 9, 2015. No. 14A770. The petition for certiorari was filed on that date. This Court granted certiorari on June 29, 2015. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

8 U.S.C. § 1101(a)(43) is reproduced in the Appendix to this brief.

STATEMENT

This case is about whether the phrase "described in" bears its ordinary meaning in the Immigration and Nationality Act, or whether, as the government maintains, the phrase means something very different.

Petitioner George Luna[1] has been a lawful permanent resident of this country for 32 years, since he was nine years old. The only blemish on his record is a 1999 conviction in New York for attempted arson in the third degree, for which he was sentenced to one day in jail. Now the government plans to remove him from the country because of this conviction. Whether Luna is eligible to seek the discretionary relief of cancellation of removal depends on whether he was convicted of an "aggravated felony" under 8 U.S.C. § 1101(a)(43). That question turns on whether the New York offense of arson is "an offense described in" 18 U.S.C. § 844(i), the federal arson statute.

Under the plain meaning of the aggravated felony definition, the New York offense of arson is not "described in" the federal arson statute, because the New York offense lacks one of the elements of federal arson, the interstate commerce element.

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[1] Petitioner's full name is Jorge Luna Torres. In accordance with Spanish-language naming customs, he uses the last name Luna. Because he has spent virtually all of his life in the United States, everyone calls him George, including his parents and siblings.

I. Legal background

A. The definition of "aggravated felony"

Under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, several important consequences flow from a determination that an offense constitutes an "aggravated felony."

Some are criminal consequences. When an alien has been convicted of an aggravated felony, helping the alien enter the country is a crime punishable by up to ten years in prison. 8 U.S.C. § 1327. It is a crime, also punishable by ten years in prison, for an alien to disobey an order of removal, if the alien was ordered removed for having been convicted of an aggravated felony. 8 U.S.C. § 1253(a)(1). A removed alien who reenters the United States can be imprisoned for two years, 8 U.S.C. § 1326(a), but if he has been convicted of an aggravated felony, the potential sentence balloons to twenty years, § 1326(b)(2).

Others are civil consequences. A person who has been convicted of an aggravated felony can be deported, 8 U.S.C. § 1227(a)(2)(A)(iii), is ineligible for cancellation of removal,§ 1229b(a)(3), is ineligible for asylum, § 1158(b)(2)(B)(i), is subject to expedited removal proceedings, § 1228(a)(3)(A), faces additional obstacles to reentering the U.S., § 1182(a)(9)(A)(ii), and can even be sent to a country where his life would be threatened, § 1231(b)(3)(B).

The INA defines "aggravated felony" in 8 U.S.C. § 1101(a)(43) by providing a long list of the crimes that qualify as aggravated felonies. The statute refers to these crimes in three different ways.

First, the statute refers to many crimes by their generic names. These include "murder," "rape," and "sexual abuse of a minor" (subsection A); "theft" and "burglary" (subsection G); and several others. Congress chose not to include arson in this list of generically-named crimes.

Second, the statute refers to a few crimes by incorporating definitions of terms that appear elsewhere in the U.S. Code. In these provisions, the statute refers to offenses that involve terms *"defined in"* another Code section. For example, subsection B refers to "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." The statutes cited in these parentheticals provide the definitions of the terms "controlled substance" and "drug trafficking crime."

Third, the statute refers to many crimes as "an offense *described in"* a particular U.S. Code section. These Code sections do not contain definitions; rather, they list the elements of crimes. *See, e.g.*, subsection D ("an offense described in" 18 U.S.C. §§ 1956 or 1957); subsection E ("an offense described in" various subsections of 18 U.S.C. §§ 842, 844, 922, or 924, or 26 U.S.C. § 5861). This is how the definition of aggravated felony incorporates the federal offense of arson, which appears in subsection E(i)'s reference to the "offense described in" 18 U.S.C. § 844(i), the federal arson statute.

After this list of crimes, the statute specifies that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of

Federal or State law." 8 U.S.C. § 1101(a)(43) (unnumbered penultimate sentence). To determine whether a state offense qualifies as an aggravated felony, Congress intended courts to use the categorical approach.[2] *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013).

> Under this approach we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony. By "generic," we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved facts equating to the generic federal offense.

Id. at 1684 (citations, quotation marks, brackets, and ellipsis omitted).

The offenses referred to by their generic names are thus aggravated felonies in either their federal or state versions. *Lopez v. Gonzalez*, 549 U.S. 47, 57 (2006) ("a generic description ... not specifically couched as a state offense or a federal one, covers either one"). An offense falling within the generic description of murder, for example, is an aggravated

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[2] The categorical approach is not used in certain narrow circumstances that are not present here. *See Nijhawan v. Holder*, 557 U.S. 29, 36-40 (2009).

felony whether it is state-law murder or federal-law murder, because it is referred to by its generic name in subsection A.

For the offenses referred to as "described in" specified sections of the U.S. Code, the categorical approach requires determining whether the state offense includes all the elements of the specified federal offense. *Lopez*, 549 U.S. at 57 ("a state offense whose elements include the elements of a felony punishable under [the specified federal statute] is an aggravated felony"). For example, subsection D lists as an aggravated felony "an offense described in section 1956 of Title 18," the section that proscribes money laundering. To determine whether state-law money laundering is an aggravated felony, a court would compare the elements of state-law money laundering with the elements of money laundering under 18 U.S.C. § 1956. If state-law money laundering includes all the elements listed in 18 U.S.C. § 1956, state-law money laundering would be an aggravated felony.

Some of the offenses "described in" sections of the U.S. Code include an element pertaining to interstate commerce. For example, the federal arson statute provides: "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property *used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce* shall be imprisoned for not less than 5 years." 18 U.S.C. § 844(i) (emphasis added).

The New York arson statute under which George Luna was convicted lacks this interstate commerce element. The New York statute provides: "A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion." N.Y. Penal Law § 150.10. The New York offense of arson thus does not include all the elements of the federal offense of arson. *Jones v. United States*, 529 U.S. 848, 859 (2000).

Under the categorical approach, a state offense is not "described in" a federal criminal statute if the federal statute includes an element that the state offense lacks. In that situation, the state conviction would not necessarily establish all the facts that would be needed to support a conviction under the federal statute. The dispute in this case is about whether there is an exception to this rule for an element pertaining to interstate commerce.[3]

B. The BIA's conflicting interpretations

The Board of Immigration Appeals has taken both sides of this issue. At first the BIA read section 1101(a)(43) literally, to mean that a state offense is not "described in" a federal statute if the state of-

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[3] *Compare Bautista v. Attorney Gen.*, 744 F.3d 54, 58-68 (3d Cir. 2014), *with* Pet. App. 7a-12a; *Espinal-Andrades v. Holder*, 777 F.3d 163, 167-69 (4th Cir. 2015), *pet. for cert. pending*, No. 14-1268 (filed Apr. 22, 2015); *Nieto Hernandez v. Holder*, 592 F.3d 681, 684-86 (5th Cir. 2009); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 500-03 (7th Cir. 2008); *Spacek v. Holder*, 688 F.3d 536, 538-39 (8th Cir. 2012); *United States v. Castillo-Rivera*, 244 F.3d 1020, 1023-24 (9th Cir. 2001).

fense lacks the federal statute's interstate commerce element. In *In re Vasquez-Muniz*, 22 I. & N. Dec. 1415 (BIA 2000), the BIA rejected the government's contention that "jurisdictional" elements should be ignored in determining whether a state offense is "described in" a federal statute. The BIA observed that characterizing the interstate commerce element as "jurisdictional" "does not change the fact that it is an element of the offense." *Id.* at 1420.

But the BIA reached the opposite view thirteen months later. The BIA issued a new opinion in *Vasquez-Muniz* determining that a state offense may be "described in" a federal statute even if the state offense lacks an interstate commerce element present in the federal statute. *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002). The BIA now reasoned that "if state crimes must include a federal jurisdictional element in order to be classified as aggravated felonies, then virtually no state crimes would ever be included." *Id.* at 211.

In *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011), *vacated by Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014), the BIA applied its new interpretation to the New York arson statute that is at issue in the instant case. The BIA held that "the omission of the Federal jurisdictional element in § 844(i) from the State statute is not dispositive. The offense in section 150.10 of the New York Penal Law contains all of the other substantive elements that are contained in § 844(i), so it is an aggravated felony." *Id.* at 620.

II. Facts and proceedings below

Petitioner George Luna has been a lawful permanent resident of the United States since 1983, when his parents brought him to this country from the Dominican Republic at the age of nine. Ever since, Luna has lived in Brooklyn, New York. He is a carpenter and an electrician, and he is taking classes at City University of New York toward a degree in civil engineering. He owns his own home, not far from his parents, his brother, his sister, and his niece and nephews. Luna is engaged to be married. His fiancée is a graduate of Columbia University. Luna was her sole source of financial support while she earned a master's degree. They have postponed their wedding plans until they find out whether Luna will be able to stay in the country. 2d Cir. JA 275, 282, 286. He has only one blemish on his record. In 1999, he pled guilty to one count of attempted arson in the third degree, in violation of N.Y. Penal Law §§ 110 and 150.10. He was sentenced to one day of imprisonment and five years of probation. Pet. App. 2a.

In 2006, Luna was returning from a trip to the Dominican Republic when he was charged with inadmissibility as an alien convicted of a crime involving moral turpitude. Pet. App. 2a. An Immigration Judge found him inadmissible on this ground, a conclusion Luna has not further challenged. Pet. App. 2a.

Luna applied for the discretionary relief of cancellation of removal. An Immigration Judge found him ineligible for cancellation of removal under 8 U.S.C.

§ 1229b(a)(3), on the ground that he had been convicted of an aggravated felony. Pet. App. 18a-23a.

The Board of Immigration Appeals dismissed Luna's appeal. Pet. App. 15a-17a. The BIA explained that in *Matter of Bautista* it had already determined that the New York offense of attempted arson in the third degree is an aggravated felony. Pet. App. 16a. The BIA noted that "the sole difference between the federal arson offense set forth at 18 U.S.C. § 844(i) and the New York state offense is that the federal offense has an additional element, namely, that the property must be 'used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.'" Pet. App. 16a (quoting 18 U.S.C. § 844(i)). But because this extra federal element was merely a "jurisdictional element," the BIA held, it could be ignored when comparing the federal and state offenses. Pet. App. 16a.

Luna sought review in the U.S. Court of Appeals for the Second Circuit. After briefing, but before oral argument in Luna's appeal, the Third Circuit vacated the BIA's *Matter of Bautista* decision. Pet. App. 3a; *Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014). The Third Circuit determined that the New York offense does not qualify as an aggravated felony because it lacks the interstate commerce element. Pet. App. 3a; *Bautista*, 744 F.3d at 58-69.

The Second Circuit nevertheless denied Luna's petition for review. Pet. App. 1a-14a. The Second Circuit noted that section 1101(a)(43) sometimes uses "described in" to refer to offenses, and sometimes uses "defined in." Pet. App. 8a-9a. The Second Cir-

cuit inferred that "described in" must be a looser standard than "defined in," and that a state offense identified as "described in" a federal statute "need not reproduce the federal jurisdictional element to have immigration consequences." Pet. App. 9a-10a.

"On the other hand," the Second Circuit continued, "we do not think that this conclusion follows inexorably from the INA's text and structure." Pet. App. 10a. The court pointed out that section 1101(a)(43)'s unnumbered penultimate sentence does not "unequivocally express[ ] Congress's intent to discount federal jurisdictional elements in determining whether a state offense is 'described in' a federal statute." Pet. App. 10a.

After finding the statute ambiguous, the Second Circuit deferred to the BIA's interpretation under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 12a.

SUMMARY OF ARGUMENT

I. The New York offense of arson is not "described in" 18 U.S.C. § 844(i), because it lacks one of section 844(i)'s elements, the interstate commerce element. "Described in," as used in the definition of aggravated felony and throughout the U.S. Code, literally means "described in." It does not mean "described in except for one element." The Court of Appeals erroneously inferred that "described in" is a looser term than "defined in." In fact, the only difference between the two, in this statute and throughout the Code, is that "defined in" refers to definitions, while "described in" refers to matter other than definitions.

Had Congress intended to include state-law arson as an aggravated felony, Congress would have used the word "arson" rather than the phrase "the offense described in" section 844(i). By using generic names (like "murder" and "rape") to refer to some crimes, but citations to federal criminal statutes to refer to others, Congress indicated that in the first category all state offenses that meet the generic definition are aggravated felonies, but that in the second category state offenses are aggravated felonies only where they include all the elements of the specified federal statute.

Congress sometimes includes elements in federal statutes, like a nexus to interstate commerce, in part to ensure its own power to punish an offense, but such elements cannot be ignored just by labeling them "jurisdictional." Like any other elements, they must be proven beyond a reasonable doubt. The government may not parse the elements of a crime according to their purposes or their perceived importance.

Some of the Courts of Appeals have labored under the misimpression that including the interstate commerce element would render the penultimate sentence of section 1101(a)(43) a nullity. But this view is mistaken, because most of the offenses listed in section 1101(a)(43) have no interstate commerce element. Many state offenses qualify as aggravated felonies when "described in" is taken to mean "described in."

II. The government contends that the plain meaning of "described in" would yield an absurd result—

that federal arson, but not state arson, is an aggravated felony. But this result is not absurd. Congress could reasonably have concluded that federal arsons tend to be more serious than state arsons, and that serious state offenses not defined as aggravated felonies are already covered by other provisions of the INA.

III. If section 1101(a)(43) were ambiguous, it would have to be construed against the government. Section 1101(a)(43) has criminal as well as civil applications. Ambiguities must therefore be resolved against the government under the rule of lenity. A word or a phrase in a statute cannot have two different meanings, one in civil cases (because of *Chevron*) and another in criminal cases (because of the rule of lenity). To ensure consistency in interpretation, the rule of lenity applies in both contexts.

Deportation is one of the consequences of an aggravated felony conviction. Even if the statute did not have criminal consequences, therefore, ambiguities would have to be resolved according to the longstanding principle of construing deportation statutes in favor of the alien. This principle, like the other normal tools of statutory construction, comes into play at step one of the *Chevron* analysis, in determining whether the intent of Congress is unambiguous.

In any event, the BIA's interpretation of the statute is patently unreasonable, so it is unworthy of deference for that reason as well.

ARGUMENT

Rather than including the generic term "arson" within the definition of aggravated felony, Congress included "an offense described in" 18 U.S.C. § 844(i). But the New York offense of arson is not "described in" section 844(i), because the New York offense lacks one of the elements required for a conviction under section 844(i). If Congress had wanted to include ordinary state-law arson as an aggravated felony, Congress would have used the word "arson."

The government can find no refuge in the doctrine that statutes should be interpreted to avoid absurd results, because it was quite reasonable for Congress to exclude ordinary state-law arson from the definition of aggravated felony. Nor is the government's view entitled to *Chevron* deference. The statute is not ambiguous, and if it were, it would have to be construed against the government under both the rule of lenity and the principle of construing deportation statutes in favor of the alien.

I. The New York offense of arson is not "described in" 18 U.S.C. § 844(i), because it lacks one of the elements listed in section 844(i).

The text of section 1101(a)(43) makes clear that a state offense is "described in" a federal statute only if the state offense includes all the elements of the federal statute, including an interstate commerce element. By using the phrase "an offense described in" 18 U.S.C. § 844(i), instead of the generic term "arson," Congress indicated that ordinary state-law ar-

son is not an aggravated felony, unlike the many other state offenses Congress referred to by their generic names. The government cannot ignore an element of a federal offense just by labeling the element "jurisdictional."

A. "Described in" means "described in," not "described in except for one element."

In ordinary speech, a concept is "described in" a text only if the text actually depicts that very concept, not some other concept that is similar. Standard dictionaries reflect this usage. *Describe* means "express, explain, set forth, relate, recount, narrate, depict, delineate, portray." *Black's Law Dictionary* 401 (5th ed. 1979). It means "to represent or give an account of in words." *Webster's New Collegiate Dictionary* 307 (1976). As the BIA correctly pointed out in its first *Vasquez-Muniz* opinion, dictionaries refute the government's contention that "described in" means "that which is analogous or similar in nature to that which is being compared." *Vasquez-Muniz*, 22 I. & N. Dec. at 1420.[4]

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[4] The Fourth Circuit erroneously concluded that two secondary definitions of "describe" found in the American Heritage Dictionary are looser than the primary definition. *See Espinal-Andrades*, 777 F.3d at 168 (citing *The American Heritage Dictionary of the English Language* 490 (5th ed. 2011), and quoting the definitions as "[t]o convey an idea or impression of" and "[t]o trace the form or outline of"). These are the American Heritage Dictionary's second and fourth definitions of "describe." The first definition is identical to the definitions found in other dictionaries: "To give an account of in speech or writing: *describe a sea voyage*." Moreover, when the second and fourth def-

In the INA, Congress used the phrase "described in" in its ordinary sense. *See Lopez*, 549 U.S. at 53 (construing terms in the INA according to their "commonsense conception" and their "everyday understanding"). It means the offense "expressed" in or "set forth" in the specified statute. The offense "described in" 18 U.S.C. § 844(i) is the particular offense set forth in that statute, not a vague category of similar offenses. If a person were to commit an offense similar to the one described in section 844(i) but lacking one of its elements—whether the mental state, the damaging of property, the property's nexus to interstate commerce, or the use of fire or explosives—he would not be committing the offense "described in" section 844(i). *See Jones*, 529 U.S. at 859.

Every use of "described in" in section 1101(a)(43) likewise refers to a federal statute that specifies the elements of a criminal offense. In each instance, the offense "described in" the designated statute is the particular offense whose elements are listed there, not a vague class of similar offenses lacking one ele-

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initions are read in full, it is clear that they are not any looser than the conventional definition. The full text of the second definition is "[t]o convey an idea or impression of; characterize: *She described her childhood as a time of wonder and discovery.*" This use of "describe" is not a reference to categories of things similar to a childhood or to a time of wonder and discovery; it is a reference to the things themselves. The full text of the fourth definition is "[t]o trace the form or outline of: *describe a circle with a compass.*" This is not a reference to a class of shapes resembling circles or to a class of mathematical instruments resembling compasses, but to circles and compasses. This last sense of "describe" was in any event unlikely to have been intended by Congress.

ment of the designated offense. If "described in" actually meant "described in except for one element," this clear definition of aggravated felony would lose all its clarity, because it would include not just the designated offenses but a nebulous penumbra of similar offenses.

By the same token, the penultimate sentence of section 1101(a)(43) states that the term aggravated felony "applies to an offense *described in* this paragraph whether in violation of Federal or State law" (emphasis added). If "described in" actually meant "described in except for one element," the definition of aggravated felony would become extraordinarily ambiguous.

Indeed, a looser definition of "described in" would wreak havoc on the entire U.S. Code, which relies heavily on the ordinary meaning of the phrase. Just to pick one of thousands of examples, the tax code states that "qualified dividend income" does not include "any dividend *described in* section 404(k)." 26 U.S.C. § 1(h)(11)(B)(ii)(III) (emphasis added). Section 404(k), in turn, provides a list of characteristics such a dividend must have. 26 U.S.C. § 404(k). Tax planning would be impossible under a non-literal definition of "described in," because one could never predict the tax treatment of a dividend with all but one of the required characteristics. If "described in" does not literally mean "described in," the U.S. Code would be strewn with thousands of such Pandora's boxes.

In Title 8 alone, there are 765 instances in which Congress used "described in" to refer to matter in a

statutory provision.[5] Title 8 is just one of 52 titles in the U.S. Code. If "described in" means anything but "described in," we should start preparing for an awful lot of litigation.

The Court of Appeals below drew an erroneous inference from the fact that some subsections of 8 U.S.C. § 1101(a)(43) use the term "described in," while others use the term "defined in." The Court of Appeals mistakenly reasoned that "described in" must mean something less precise than "defined in." Pet. App. 9a-10a.

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[5] *See* 8 U.S.C. §§ 1101 (67 times), 1102 (3 times), 1105, 1151 (11 times), 1152 (6 times), 1153 (26 times), 1154 (35 times), 1157 (twice), 1158 (6 times), 1160 (8 times), 1182 (81 times), 1182d, 1183a (3 times), 1184 (71 times), 1186a (13 times), 1186b (12 times), 1187 (15 times), 1188 (10 times), 1189 (twice), 1202 (4 times), 1225 (11 times), 1226, 1226a (5 times), 1227 (12 times), 1228 (9 times), 1229 (twice), 1229a (4 times), 1229b (7 times), 1229c (5 times), 1231 (10 times), 1232 (10 times), 1252 (3 times), 1253 (twice), 1254a (3 times), 1254b (twice), 1255 (23 times), 1255a (10 times), 1258, 1281, 1288 (15 times), 1321 (3 times), 1324 (3 times), 1324a (17 times), 1324b (twice), 1324c (twice), 1326 (twice), 1330 (twice), 1356 (14 times), 1357 (twice), 1365a (6 times), 1365b (3 times), 1368 (twice), 1372 (11 times), 1375a (10 times), 1375b (5 times), 1375c (7 times), 1376 (twice), 1378 (3 times), 1379 (twice), 1380, 1381 (twice), 1421 (3 times), 1424 (5 times), 1427, 1430, 1433, 1435, 1438, 1439, 1440, 1440-1 (3 times), 1440f (4 times), 1441 (twice), 1455 (twice), 1457, 1503, 1522 (8 times), 1531 (3 times), 1534 (4 times), 1535, 1536 (twice), 1537 (twice), 1573, 1574 (5 times), 1611, 1612 (41 times), 1613 (8 times), 1615 (twice), 1622 (4 times), 1624, 1631 (3 times), 1632, 1642, 1711 (3 times), 1713, 1721 (3 times), 1722, 1723 (twice), 1724, 1731, 1732, 1733, 1737 (twice), 1751, 1752, 1753, 1761 (twice), 1771, 1776 (13 times).

In fact, however, section 1101(a)(43) uses "defined in" only when referring to a federal statute that explicitly provides a *definition* of a term. *See* subsection B (referring to the definition of "controlled substance" in 21 U.S.C. § 802 and the definition of "drug trafficking crime" in 18 U.S.C. § 924(c)); subsection C (referring to the definitions of "firearm" and "destructive device" in 18 U.S.C. § 921 and to the definition of "explosive materials" in 18 U.S.C. § 841(c)); subsection F (referring to the definition of "crime of violence" in 18 U.S.C. § 16).

This use of "defined in" is standard throughout the U.S. Code, which consistently uses "defined in" to refer to a definition. Examples can be found on virtually every page. Biofuels research grants are available to "a part B institution (as *defined in* section 1061 of Title 20)." 42 U.S.C. § 17034(a)(2) (emphasis added). If one turns to 20 U.S.C. § 1061, one finds the definition of "part B institution." The Securities and Exchange Commission is prohibited from requiring the registration of "any security-based swap agreement (as *defined in* section 78c(a)(78) of this title)." 15 U.S.C. § 77b-1(b)(2) (emphasis added). If one turns to that provision, one finds the definition of "security-based swap agreement."

The use of "defined in" to refer to definitions is recommended by the drafting manuals published by the legislative counsel's offices of both houses of Congress. *See* U.S. Senate Office of the Legislative Counsel, *Legislative Drafting Manual* 22 (1997); U.S. House of Representatives Office of the Legislative

Counsel, *House Legislative Counsel's Manual on Drafting Style* 31 (1995).

In the U.S. Code, "described in" is thus not a looser term than "defined in." The difference between them is that they refer to different things. The Code uses "defined in" to refer to definitions; it uses "described in" to refer to matter other than definitions. A nice example of this distinction can be found in 8 U.S.C. §§ 1612 and 1622, both of which include a reference to "a veteran (as *defined in* section 101, 1101, or 1301, or as *described in* section 107 of Title 38)" (emphases added). The first three of the statutes cited in the parenthetical include definitions of "veteran." 38 U.S.C. §§ 101(2), 1101(1), 1301. The last does not. Rather, it describes certain kinds of military service deemed not to constitute active service. 38 U.S.C. § 107.

This distinction is faithfully followed in 8 U.S.C. § 1101(a)(43), which uses "defined in" to point to definitions, and uses "described in" when referring to statutes that describe crimes by stating their elements. That is the only difference between the two phrases.

B. Congress's use of the phrase "an offense described in" 18 U.S.C. § 844(i), rather than the generic term "arson," indicates that Congress did not intend ordinary state-law arson to be an aggravated felony.

If Congress had intended to include ordinary state-law arson as an aggravated felony, subsection

E would have used the generic term "arson," rather than stating "an offense described in" 18 U.S.C. § 844(i). This was the method Congress used in subsection A for murder, rape, and sexual abuse of a minor, in subsection G for theft and burglary, and in several other subsections that likewise identify offenses by their generic names. "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citation, bracket, ellipsis, and internal quotation marks omitted).

By using generic names to refer to some crimes, but citations to the U.S. Code to refer to others, Congress indicated that in the first category all state offenses that meet the generic definition are aggravated felonies, but that in the second category state offenses are aggravated felonies only where they include all the elements of the specified federal statute. "We cannot imagine that Congress took the trouble to incorporate its own statutory scheme of felonies and misdemeanors if it meant courts to ignore it." *Lopez*, 549 U.S. at 58.

The government suggests (BIO 15-16) that "arson" would have been too vague a word for Congress to use, because of ostensible variations among states in the elements of arson. In fact, however, Congress often uses the word "arson" when it wants to refer generically to arson. In the Armed Career Criminal Act, for example, Congress imposed enhanced pun-

ishment on certain defendants with three or more state or federal "violent felony" convictions. 18 U.S.C. § 924(e)(1). The Act defines "violent felony" to include "arson." 18 U.S.C. § 924(e)(2)(B)(ii).[6] Likewise, one of the federal racketeering statutes criminalizes a range of activities relating to "arson in violation of the laws of the State in which committed." 18 U.S.C. § 1952(b). Under its authority to regulate Indian country, Congress has prohibited several generically-named crimes, including "arson." 18 U.S.C. § 1153(a). These examples suggest that Congress is hardly reluctant to use the word "arson" in a generic sense.

Indeed, the word "arson" appears throughout the U.S. Code. *See, e.g.*, 18 U.S.C. § 1111(a) (defining first degree murder to include murder committed in the perpetration of "any arson"); 18 U.S.C. § 1961(1)(A) (defining "racketeering activity" to include "any act or threat involving ... arson"); 18 U.S.C. § 1461 (prohibiting the mailing of any "matter of a character tending to incite arson"); 18 U.S.C. § 846(b) (authorizing the Attorney General "to establish a national repository of information on incidents involving arson"); 15 U.S.C. § 2220(1) (directing the Federal Emergency Management Agency to develop "arson detection techniques"). When Congress wants to say "arson," it says "arson."

Moreover, the supposed ambiguity of generic names for crimes did not stop Congress from using

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[6] The Armed Career Criminal Act's reference to arson appears just before the residual clause the Court found unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

many other generic names for crimes in the definition of aggravated felony, including "murder," "rape," "sexual abuse," "theft," "burglary," "prostitution," "fraud," "deceit," "bribery," "counterfeiting," "forgery," "obstruction of justice," "perjury," "attempt," and "conspiracy." If Congress had wanted to reach all state arsons as aggravated felonies, as it did for these other crimes, it would have used the word "arson."

But Congress did not say "arson." Instead, Congress said "an offense described in" 18 U.S.C. § 844(i), a statute that "is not soundly read to make virtually every arson in the country a federal offense," *Jones*, 529 U.S. at 859, because it prohibits the burning only of property "used in interstate or foreign commerce." The offense described in section 844(i) is federal arson, not generic arson.[7]

Using the word "arson" would not have been the only way to include ordinary state-law arson in the definition of aggravated felony. Congress had two other options that would have been just as easy, if that is what Congress had wished to do.

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[7] The Court of Appeals below speculated that perhaps Congress did not use the word "arson" because Congress also wished to include several explosives offenses in 18 U.S.C. § 844 other than arson. Pet. App. 9a n.2. But if Congress had wished to include state-law arson along with these other federal explosives offenses, Congress would most naturally have provided that aggravated felonies include "arson" as well as the explosives offenses "described in" 18 U.S.C. § 844. This was the method Congress used, for example, in subsection K, which provides that aggravated felonies include managing a "prostitution business" as well as the prostitution-related offenses "described in" several specified federal statutes.

First, subsection E could have said "a Federal offense described in" one of the specified federal statutes *"or a State offense that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed."* This was the method Congress used in 18 U.S.C. § 3142(e)(2)(A), which requires pretrial detention where a "person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed." *See also* 18 U.S.C. § 3142(f)(1)(D) (using the same method); 18 U.S.C. § 5032 (providing that a juvenile shall be tried as an adult if he "has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed").[8]

Second, the penultimate sentence of section 1101(a)(43) could simply have said that state offenses count as aggravated felonies regardless of whether an interstate commerce element is present.

But Congress chose none of these options. Instead, Congress chose the one option under which ordinary state-law arson is *not* an aggravated felony. Con-

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[8] Congress enacted the first two of these provisions in the Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1976. Congress was thus well aware of this drafting technique when it defined aggravated felony several years later.

gress's use of "an offense described in" 18 U.S.C. § 844(i), rather than "arson," is comprehensible only as a decision to treat arson differently from the generically-named offenses.

Treating generic arson as an aggravated felony would yield an especially incongruous result, because many states punish as misdemeanors some arsons that would be felonies under 18 U.S.C. § 844(i) if the damaged property had a sufficient nexus to interstate commerce. *See* Ariz. Rev. Stat. § 13-1703(B); Ark. Stat. § 5-38-301(b)(1); Colo. Rev. Stat. § 18-4-103(3); Del. Code tit. 11, § 804(b)(1); D.C. Code § 22-303; Fla. Stat. § 806.031(1); Iowa Code § 712.4; Md. Code, Criminal Law § 6-105(c); Mich. Stat. § 750.77(3); Minn. Stat. § 609.5632; Mo. Rev. Stat. § 569.053(2) (effective Jan. 1, 2017); Neb. Rev. Stat. § 28-504(3); N.H. Rev. Stat. § 634:1(IV); N.M. Stat. § 30-17-5(B); N.Y. Penal Law. § 150.01; Ohio Rev. Code § 2909.03(B)(2)(a); Or. Rev. Stat. § 164.335(2); S.C. Code § 16-11-150(a); Tenn. Code § 39-14-304(b); Utah Code § 76-6-102(5); Va. Code. § 18.2-80; Wash. Rev. Code § 9A.48.050(2); Wyo. Stat. § 6-3-104(b). If Congress meant to classify all these misdemeanors as aggravated felonies, Congress would have said so. *See Carachuri-Rosendo v. Holder*, 560 U.S. 563, 574-75 (2010); *Lopez*, 549 U.S. at 54. In fact, however, Congress said the opposite. Rather than including generic arson as an aggravat-

ed felony, Congress included only the offense described in 18 U.S.C. § 844(i).[9]

C. An element of an offense cannot be ignored just because the element ensures that Congress has the power to punish the offense.

Federal criminal statutes sometimes include elements that, among other purposes, ensure that Congress has the power to punish the offense. A nexus to interstate commerce is one such element, but it is not the only one. These elements cannot be ignored by labeling them "jurisdictional."

For instance, subsection E defines as an aggravated felony "an offense described in" 18 U.S.C. § 844(f), which proscribes the destruction of property "owned or possessed by ... the United States." Ownership by the United States is an element of the crime in part

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[9] The legislative history of section 1101(a)(43) confirms this conclusion. The definition of "aggravated felony" first appeared as part of the Anti-Drug Abuse Act of 1988. It included only murder, drug trafficking, and firearms trafficking. Pub. L. No. 100-690, § 7342, 102 Stat. 4469-70. The penultimate sentence was added as part of the Immigration Act of 1990, which also modified the drug trafficking offenses and added the provisions for crimes of violence and money laundering. Pub. L. No. 101-649, § 501, 104 Stat. 5048. Most of the rest of section 1101(a)(43), including subsection E, was added in the Immigration and Nationality Technical Corrections Act of 1994. Pub. L. No. 103-416, § 222, 108 Stat. 4320-22. Congress thus enacted the reference to "an offense described in" 18 U.S.C. § 844(i) at the very same time that it enacted the references to several of the offenses it chose to identify by their generic names, a disparity that would not exist if Congress intended generic arson to be an aggravated felony.

to ensure that Congress has the power to punish the offense, just like the nexus to interstate commerce is an element of federal arson in part to ensure congressional power. If a person destroyed property owned and possessed by his brother-in-law, he would surely not be committing the offense "described in" 18 U.S.C. § 844(f), precisely because of the absence of this element. If this element were ignored in determining whether a state offense is an aggravated felony, it would be an aggravated felony to destroy property owned by anyone.

Likewise, subsection H defines as an aggravated felony "an offense described in" 18 U.S.C. § 876, which forbids the sending of threatening communications "by the Postal Service." The Postal Service element is in the statute in part to ensure that Congress has the power to punish the offense. If a person sent a threatening communication by Federal Express or by email, he would surely not be committing the offense "described in" 18 U.S.C. § 876, again because of the absence of this element. If this element were ignored in determining whether a state offense is an aggravated felony, it would be an aggravated felony to send a threatening communication by any means at all.

By including these two relatively narrow federal offenses in the definition of aggravated felony, Congress clearly did not mean to include all vandalism and all threats. Congress meant to include only vandalism and threats that satisfy each of the elements of the specified federal statutes, including the ele-

ment that was placed in the statute in part to ensure that Congress has the power to punish the offense.

The same is true for the offense of federal arson. A person who burns property with no nexus to interstate commerce is not committing the offense "described in" 18 U.S.C. § 844(i), because of the absence of this element. Congress meant to include as aggravated felonies only those arsons that satisfy each of the elements of section 844(i).

As these examples show, there are no second-class elements of federal criminal statutes. The interstate commerce element is "described in" section 844(i) just as fully as the other elements of federal arson. The government may not parse the elements of a crime according to their purposes or their perceived importance. *See United States v. Gaudin*, 515 U.S. 506, 511-23 (1995). Rather, the government must prove an interstate commerce element beyond a reasonable doubt, just like it must prove any other element. *United States v. Bass*, 404 U.S. 336, 347 (1971) ("the present conviction must be set aside because the Government has failed to show the requisite nexus with interstate commerce"); *Jones*, 529 U.S. at 859 (reversing an arson conviction where the government failed to prove that the property burned had a sufficient connection to interstate commerce). The government may not ignore an element of a crime just by labeling the element "jurisdictional."

D. Including the interstate commerce element does not render the penultimate sentence of section 1101(a)(43) a nullity, because most of the offenses listed in section 1101(a)(43) have no interstate commerce element.

Some of the Courts of Appeals have labored under the misimpression that a straightforward interpretation of "described in" would render the penultimate sentence of 8 U.S.C. § 1101(a)(43) a nullity, on the theory that few if any state crimes require a connection to interstate commerce. *See Espinal-Andrades*, 777 F.3d at 168-69; *Nieto Hernandez*, 592 F.3d at 685-86; *Negrete-Rodriguez*, 518 F.3d at 502; *Spacek*, 688 F.3d at 538-39; *Castillo-Rivera*, 244 F.3d at 1023. But this view is clearly mistaken, because most of the offenses listed in section 1101(a)(43) have no interstate commerce element. The penultimate sentence merely says that state offenses can qualify as aggravated felonies. It does not say that every single subsection of section 1101(a)(43) must include state offenses.

Under a straightforward interpretation of "described in," many state offenses still qualify as aggravated felonies. These include all that fit within their generic names: murder, rape, and sexual abuse of a minor (subsection A); theft and burglary (subsection G); offenses relating to prostitution (subsection K(i)); offenses involving fraud and deceit (subsection M(i)); offenses relating to failure to appear (subsections Q and T); offenses relating to commercial bribery, counterfeiting, forgery, and trafficking

in vehicles with altered ID numbers (subsection R); and offenses relating to obstruction of justice, perjury and bribery of a witness (subsection S).

Also qualifying as aggravated felonies are the state offenses incorporating terms "defined in" federal statutes. These include drug trafficking (subsection B); trafficking in firearms, destructive devices, and explosive materials (subsection C); and crimes of violence (subsection F).

Also qualifying as aggravated felonies are the state offenses "described in" federal statutes that do not contain interstate commerce elements. These include 18 U.S.C. §§ 922(o), 922(p), 922(r), and 924(h) (referred to in subsection E(ii)); parts of 26 U.S.C. § 5861 (referred to in subsection E(iii)); 18 U.S.C. § 1955 (referred to in subsection J); 18 U.S.C. §§ 1581-1585 and 1588-1590 (referred to in subsection K(iii)); 18 U.S.C. §§ 793, 798, 2153, 2381, and 2382 (referred to in subsection L(i)); 50 U.S.C. § 3121 (referred to in subsections L(ii) and L(iii)); 8 U.S.C. §§ 1324(a)(1)(A) and 1324(a)(2) (referred to in subsection N); 8 U.S.C. §§ 1325(a) and 1326 (referred to in subsection O); and 18 U.S.C. § 1546(a) (referred to in subsection P).

The penultimate sentence is thus far from a nullity—indeed, it still covers a great number of state offenses—when "described in" is taken to mean "described in."[10]

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[10] For the same reason, the penultimate sentence also covers a great many foreign offenses—all those identified by their generic names, all those incorporating terms "defined in" federal

In the Court of Appeals below, the government argued that a literal interpretation of subsection E would render meaningless the clause of 8 U.S.C. § 1231(a)(4)(B)(ii) that authorizes the Attorney General to remove an alien serving a state prison sentence "for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title)." This clause assumes that *some* state offenses must be listed in subsection E, but the government errs twice in contending that arson must be one of them. First, section 1231(a)(4)(B)(ii) by its own terms applies only to "a nonviolent offense," but the offense described in 18 U.S.C. § 844(i) is a violent offense. *See, e.g., United States v. Mitchell*, 23 F.3d 1, 2 & n.3 (1st Cir. 1994). Second, subsection E lists many federal criminal statutes, several of which do not contain interstate commerce elements. These include 18 U.S.C. § 922(o) (prohibiting the possession and transfer of machine guns), 18 U.S.C. § 922(p) (prohibiting the possession and transfer of firearms not detectable by metal detectors); 18 U.S.C. § 922(r) (prohibiting the assembly of certain firearms identical to prohibited firearms); 18 U.S.C. § 924(h) (prohibiting the transfer of firearms to be used in crimes of violence or drug trafficking); and 26 U.S.C. § 5861 (prohibiting a wide range of firearms-related conduct, most of which has no interstate commerce element). These (or at least the nonviolent ones among them) are the offenses referred to in the clause of 8 U.S.C. § 1231(a)(4)(B)(ii) on which the government

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statutes and all those "described in" federal statutes without interstate commerce elements.

relies. This clause is thus hardly meaningless when "described in" is taken to mean "described in."

II. The doctrine that statutes should not be interpreted to produce absurd results has no bearing on this case, because it was quite reasonable for Congress to exclude ordinary state-law arson from the definition of aggravated felony.

The government contends (BIO 12-14) that the plain meaning of "described in" would yield an absurd result—that federal arson, but not state arson, is an aggravated felony. But this result is not absurd at all.

To begin with, it takes an extraordinary showing to displace the text of a statute on the ground that the text would produce absurd results. "[T]he principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances," the Court has cautioned. "[T]o justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). A court must be convinced that "[i]t was unmistakably *not* Congress' intention" to accomplish what the words of the statute say. *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 453 (1989). As Chief Justice Marshall put it in the canonical statement of the absurdity doctrine, the case "must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the applica-

tion." *Sturges v. Crowninshield*, 17 U.S. 122, 203 (1819).

The government cannot come close to satisfying this high standard. Congress could reasonably have determined that federal arsons tend to be more serious than state arsons, and that serious state offenses not defined as aggravated felonies are already covered by other provisions of the INA.

A. It would not have been absurd for Congress to determine that some federal offenses tend to be more serious than their state variants.

In determining which offenses to classify as aggravated felonies, Congress had to make a judgment as to whether whole categories of crimes are sufficiently grave to warrant the "harshest deportation consequences," *Carachuri-Rosendo*, 560 U.S. at 566, such as mandatory removal. For some crimes—those referred to by their generic names, such as murder and rape—Congress could reasonably have determined that both their federal and state versions are sufficiently serious. For other crimes—those referred to as "described in" a section of the U.S. Code containing an interstate commerce element—Congress could reasonably have determined that the state variants tend to be less heinous than the federal variants, and that there are enough minor state convictions that the entire category should not be classified as an aggravated felony.

Arson is a perfect example. Minor arsons are normally prosecuted by the states, not by the federal

government. Some state arsons are even misdemeanors. *See* page 25 *supra*. Federal arson cases tend to be more serious.[11] Susan R. Klein et al., *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006-2010*, 51 Hous. L. Rev. 1381, 1406 (2014) ("higher dollar value [arson] cases are more likely to be brought under federal, as opposed to New York State, statutes"); *id.* at 1416-19 (regression analysis showing that an arson case is much more likely to be charged as federal crime where the victim is a minor, where the defendant uses a weapon, where the defendant has several prior arrests for violent offenses, or where the arson is part of a conspiracy).

This pattern, in which federal arsons tend to be more serious than state arsons, was almost certainly intended by Congress. The federal statutes criminalizing arson and the use of explosives were first enacted as part of the Organized Crime Control Act of 1970, because Congress was particularly concerned with bombings by radical groups of the era. John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 Am. Crim. L. Rev. 151, 192-93 (1985). Congress did not enact the federal arson statute in order to duplicate state prosecutions of minor arsons. The point was to put the weight of the Justice Department behind the major cases.

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[11] This case is a good example. A violation of the federal arson statute carries a minimum sentence of five years in prison. 18 U.S.C. § 844(i). George Luna was sentenced to one day in prison. Pet. App. 2a.

To be sure, some state arsons are more serious, and occasional federal arsons may be minor. But the question is not whether Congress designed a perfect mechanism for separating major from minor arsons. The question is whether a literal reading of the statute would be too absurd to contemplate—whether it "would be so monstrous, that all mankind would, without hesitation, unite in rejecting" it. *Sturges*, 17 U.S. at 203. It would not be.

The same is true of the other crimes section 1101(a)(43) refers to as "described in" federal statutes containing interstate commerce elements. Congress could reasonably have determined that these crimes tend to be more serious when conducted on a national scale than on a local scale. It would not have been absurd for Congress to suppose, for example, that interstate racketeering is worse, all else equal, than local racketeering. *See* subsection J (defining as an aggravated felony "an offense described in" 18 U.S.C. § 1962). It would not have been absurd for Congress to conclude that distributing child pornography through interstate networks is worse than handing child pornography to one's neighbor. *See* subsection I (defining as an aggravated felony "an offense described in" 18 U.S.C. § 2252). It would not have been absurd for Congress to determine that more harm is done when illegal firearms circulate in national markets than when they circulate only in local markets. *See* subsection E(ii) (defining as an aggravated felony "an offense described in" 18 U.S.C. § 922(g)). Read literally, to include interstate commerce elements, these provisions yield consequences that are quite sensible. They are certainly

not so absurd that Congress must be presumed not to have intended them.

These consequences are even more reasonable when one considers that the statutory definition of aggravated felony also includes a backstop in subsection F, which classifies as an aggravated felony "a crime of violence ... for which the term of imprisonment [is] at least one year." Many state offenses serious enough to warrant deportation, but not encompassed within one of the other subsections, will fall within this category. It would hardly have been absurd for Congress to take this backstop into account in deciding which *other* state offenses to classify as aggravated felonies.

B. It would not have been absurd for Congress to take into account that serious state offenses not defined as aggravated felonies are already covered by other provisions of the INA.

The commission of an aggravated felony is but one of several grounds for deportation and other adverse immigration consequences. It would not have been absurd for Congress to take into account that serious state offenses not defined as aggravated felonies would already fall within one of these other grounds.

For example, a person who is convicted of an aggravated felony is deportable, 8 U.S.C. § 1227(a)(2)(A)(iii), but so is a person who is convicted of a crime of moral turpitude under certain frequently-met conditions, § 1227(a)(2)(A)(i), a person who is convicted of two crimes of moral turpitude,

§ 1227(a)(2)(A)(ii), a person who flees from an immigration checkpoint, § 1227(a)(2)(A)(iv), a person who fails to register as a sex offender, § 1227(a)(2)(A)(v), a person convicted of virtually any offense relating to controlled substances, § 1227(a)(2)(B), a person convicted under virtually any law involving firearms, § 1227(a)(2)(C), a person convicted of any of several offenses involving national security, § 1227(a)(2)(D), and a person convicted of a crime of domestic violence or a crime against children, § 1227(a)(2)(E).

It would not have been absurd—indeed it would have been eminently reasonable—for Congress to take into account these additional grounds for deportation and other adverse immigration consequences when Congress determined which state offenses to classify as aggravated felonies. For instance, any state firearm offense serious enough to warrant deportation would render its perpetrator deportable under section 1227(a)(2)(C)'s separate ground for firearm offenses. State arsons serious enough to warrant deportation would be crimes of moral turpitude likely warranting deportation on that ground alone. *See, e.g.*, *Vuksanovic v. Attorney General*, 439 F.3d 1308, 1311 (11th Cir. 2006). Congress could reasonably have determined that there was no need to classify *all* state firearm offenses or *all* state arsons as aggravated felonies, because the more serious state offenses were already covered by other provisions.

Moreover, many of the adverse immigration consequences that flow from the commission of an aggravated felony involve ineligibility for discretionary

relief, such as asylum or cancellation of removal. *Moncrieffe*, 133 S. Ct. at 1682; *Carachuri-Rosendo*, 560 U.S. at 581. It would not have been absurd—again, it would have been quite reasonable—for Congress to expect that the Attorney General would take an alien's criminal record into account in deciding whether to grant discretionary relief, even if the alien's criminal record does not include an aggravated felony.

For these reasons, a literal interpretation of the statute produces results that are quite sensible. At the very least, the results are not so absurd "as to shock the general moral or common sense." *Crooks*, 282 U.S. at 60.

III. If the statute were ambiguous, it would have to be construed against the government under both the rule of lenity and the principle of construing ambiguities in deportation statutes in favor of the alien.

Section 1101(a)(43) is not ambiguous, so there is no occasion to employ an ambiguity-resolving interpretive canon. But if the statute were ambiguous, the BIA's interpretation would not be entitled to *Chevron* deference. First, because the statute has not just civil but also criminal applications, the rule of lenity applies, to ensure that the statute is interpreted consistently in both contexts. Second, because deportation is one of the consequences of an aggravated felony conviction, the statute must be construed in George Luna's favor under the longstanding presumption that deportation statutes are con-

strued in favor of the alien. Finally, the BIA's interpretation of the statute is in any event unreasonable, so it is unworthy of deference on that ground as well.

A. Because this statute has criminal applications as well as civil applications, any ambiguities must be resolved against the government under the rule of lenity.

Section 1101(a)(43)'s definition of aggravated felony has criminal applications. It is a crime to assist an inadmissible alien to enter the United States—if the alien was convicted of an aggravated felony. 8 U.S.C. § 1327. It is a crime for an alien to disobey an order of removal—if the alien was convicted of an aggravated felony. 8 U.S.C. § 1253(a)(1). A removed alien who reenters the United States can be imprisoned for two years, 8 U.S.C. § 1326(a), but if he has been convicted of an aggravated felony, the maximum sentence is twenty years, § 1326(b)(2).

Section 1101(a)(43)'s definition of aggravated felony also has civil applications. A person convicted of an aggravated felony can be deported, 8 U.S.C. § 1227(a)(2)(A)(iii), and is ineligible for cancellation of removal, § 1229b(a)(3), among other noncriminal consequences.

Because the statute has both criminal and civil applications, ambiguities must be resolved against the government under the rule of lenity. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncrimi-

nal context, the rule of lenity applies."); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality opinion) ("although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications .... It is proper, therefore, to apply the rule of lenity ...."); *id.* at 519 (Scalia, J., concurring in the judgment) (agreeing with the application of the rule of lenity); *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013) (noting that the rule of lenity would be applied to a statute authorizing civil remedies if the statute were ambiguous, because the statute also has criminal applications); *id.* at 2222 (Ginsburg, J., dissenting) (finding the statute ambiguous and applying the rule of lenity); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (noting that the rule of lenity applies "when a statute with criminal sanctions is applied in a noncriminal context").

No other conclusion is possible. It would be impossible for a word or a phrase in a statute to have two different meanings, one in civil cases (because of *Chevron*) and another in criminal cases (because of the rule of lenity). *United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality opinion) (rejecting the possibility of "giving the same word, *in the same statutory provision*, different meanings *in different factual contexts*"). To ensure that statutes are interpreted consistently in different kinds of cases, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though another of the statute's applications, standing alone, would not support the same limitation. The lowest common denomina-

tor, as it were, must govern." *Clark v. Martinez*, 543 U.S. 371, 380 (2005).

Nor would it be possible to apply *Chevron* deference across the board, to criminal as well as civil applications of a statute, because "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014). Deference in criminal cases "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in the judgment). Worse, deference to the executive branch in criminal cases would "collide with the norm that legislatures, not executive officers, define crimes." *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., respecting the denial of certiorari). There can be no crimes lurking unexpressed in the U.S. Code. *United States v. Hudson*, 11 U.S. 32, 34 (1812). Whether a person spends twenty years in prison cannot depend on the unpredictably changing views of agency officials.

Nor would the application of *Chevron* deference in criminal cases be consonant with the reasoning underlying *Chevron*. In civil cases, resolving an ambiguity in a statute requires a policy choice, one which Congress delegated to agency administrators rather than to the courts. *Chevron*, 467 U.S. at 864-66; *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) (Roberts, C.J., concurring in the judgment) ("Courts defer to an agency's reasonable construction of an ambiguous statute because we presume that

Congress intended to assign responsibility to resolve the ambiguity to the agency."). In criminal cases, however, neither agencies nor courts have any authority to make that policy choice, because all authority over the definition of crimes belongs to the legislature. "*Chevron* describes how judges and administrators divide power. But power to define crimes is not theirs to divide." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 732 (6th Cir. 2013) (Sutton, J., concurring).

This principle applies to the interpretation of "hybrid" statutes—statutes that carry "civil *and* criminal penalties," *id.* at 730—regardless of whether the statutes are labeled as "criminal" statutes or as some other kind, and regardless of whether they happen to be located in Title 18 or in some other Title of the U.S. Code. *See, e.g.*, *Thompson/Center*, 504 U.S. at 518 (applying the rule of lenity to a tax statute in Title 26); *Kasten*, 131 S. Ct. at 1336 (noting that the rule of lenity would apply to the Fair Labor Standards Act in Title 29 if it were ambiguous). Hybrid statutes are governed by the rule of lenity to ensure that they are interpreted consistently in different factual situations, not because of any formalistic concern about whether a statute has been labeled "criminal" or assigned to Title 18. *Thompson/Center*, 504 U.S. at 518 n.10 (rejecting the notion that "in order for the rule of lenity to apply, the statute must be contained in the Criminal Code").

The situation is different where Congress, by statute, makes it a crime to violate an agency regulation. *Whitman*, 135 S. Ct. at 353 (Scalia, J., re-

specting the denial of certiorari) ("Undoubtedly Congress may make it a crime to violate a regulation, but it is quite a different matter for Congress to give agencies—let alone for us to *presume* that Congress gave agencies—power to resolve ambiguities in criminal legislation.") (citation omitted). For example, the Court has deferred to an SEC rule in a criminal case, *United States v. O'Hagan*, 521 U.S. 642, 673 (1997), where Congress explicitly made it a crime to violate the relevant SEC rules, 15 U.S.C. §§ 78ff(a), 78n(e). The Court has likewise deferred to an Interior Department regulation implementing a provision of the Endangered Species Act capable of criminal enforcement, *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 704 n.18 (1995), where Congress explicitly made it a crime to violate the relevant regulations, 16 U.S.C. § 1540(b)(1).

But this case is nothing like *O'Hagan* or *Sweet Home Chapter*, because this case does not involve any delegation by Congress of authority to DHS to issue regulations with criminal consequences. Here, the BIA has simply interpreted a statute that has both criminal and civil applications. When such a hybrid statute is ambiguous, the appropriate canon of construction is the rule of lenity, not *Chevron* deference.

B. Because deportation is one of the consequences of an aggravated felony conviction, ambiguities in the statute must be construed in favor of the alien.

Deportation is one of the consequences of an aggravated felony conviction. 8 U.S.C. § 1227(a)(2)(A)(iii). Even if section 1101(a)(43) did not have criminal applications, therefore, ambiguities would still have to be interpreted in George Luna's favor, under "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)); *see also Kawashima v. Holder*, 132 S. Ct. 1166, 1176 (2012) (noting that the Court has "construed ambiguities in deportation statutes in the alien's favor"); *INS v. Errico*, 385 U.S. 214, 225 (1966) (where deportation is a consequence, "the doubt should be resolved in favor of the alien"); *Costello v. INS*, 376 U.S. 120, 128 (1964) (describing this presumption in favor of the alien as required by "accepted principles of statutory construction"); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("because deportation is a drastic measure .... we will not assume that Congress meant to entrench on [the alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used").

This principle, like the other normal principles of statutory construction, comes into play at step one of the *Chevron* analysis, in determining whether the

intent of Congress is unambiguous. *St. Cyr*, 533 U.S. at 320 n.45 ("We only defer, however, to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous.") (quoting *Chevron*, 467 U.S. at 843 n.9); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) (courts "accept only those agency interpretations that are reasonable in light of the principles of construction courts normally apply"). This use of standard principles of statutory construction to resolve ambiguities at step one of *Chevron* best respects the intent of Congress, because "Congress legislates with knowledge of our basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991).

Where the meaning of a statute becomes clear by applying one of the standard principles of statutory interpretation, there is no occasion for proceeding to step two of *Chevron*. The inquiry ends at step one. *See Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009) (applying the presumption against preemption rather than deferring to the agency's view in favor of preemption); *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (applying the presumption against implied rights of action rather than deferring to the agency's view in favor of an implied right of action); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (applying the presumption against reaching difficult constitutional questions rather than deferring to the agency's view that Congress had legislated close to the outer limit of its power).

The Court of Appeals below followed circuit precedent holding that *Chevron* deference trumps the principle of construing deportation statutes in favor of the alien. Pet. App. 12a n.4 (citing *Adams v. Holder*, 692 F.3d 91, 107 (2d Cir. 2012)). But the Second Circuit's view is mistaken, because it would render the principle a dead letter. In deportation cases, the alien's adversary is always the agency that interprets the immigration statute. If ambiguities in the statute were construed in favor of the agency rather than the alien, there would be no cases in which the principle could operate. The Second Circuit worries that applying the principle "would supplant the application of *Chevron* in the immigration context." *Ruiz-Almanzar v. Ridge*, 485 F.3d 193, 198 (2d Cir. 2007). But this worry is unfounded, for two reasons. First, the principle does not supplant *Chevron*; it applies within the *Chevron* framework. Second, the principle does not apply in all immigration cases; it applies only where deportation would be a consequence. In other immigration matters the BIA is entitled to deference when it reasonably interprets ambiguities in the INA.[12]

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[12] The principle of construing deportation statutes in favor of the alien has not arisen in any of the Court's cases discussing *Chevron* deference to the BIA, either because the case did not involve deportation, *Cuellar de Osorio*, 134 S. Ct. at 2202, because the BIA was not entitled to deference, *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015); *Negusie v. Holder*, 555 U.S. 511, 521-23 (2009); *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011), or because the alien did not claim the benefit of the principle, *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

Section 1101(a)(43) should thus be construed against the government if it is ambiguous.

C. The BIA is not entitled to *Chevron* deference in any event, because its interpretation of section 1101(a)(43) is unreasonable.

Even if section 1101(a)(43) were ambiguous, and even if it did not have criminal applications, and even if deportation were not a consequence, the BIA would still not be entitled to deference, because its interpretation of the statute is patently unreasonable.

The BIA first interpreted the statute correctly in *In re Vasquez-Muniz*, 22 I. & N. Dec. 1415 (BIA 2000). The BIA carefully examined the use of the phrase "described in" in dictionaries and throughout the U.S. Code. *Id.* at 1421. The BIA observed that in other statutes, when Congress wished to exclude "jurisdictional elements," it did so explicitly. *Id.* at 1422. The BIA refuted the government's argument that a literal reading of "described in" would render the penultimate sentence a nullity. *Id.* at 1423.

The BIA flip-flopped thirteen months later. *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002). In the interim, the statute had not changed. The BIA had not acquired any new expertise. Rather, the BIA simply replaced a well-reasoned opinion with a poorly-reasoned one that reached the opposite result.

The BIA's second opinion rests entirely on three basic mistakes.

First, the BIA erroneously found that "if state crimes must include a federal jurisdictional element in order to be classified as aggravated felonies, then virtually no state crimes would ever be included." *Id.* at 211. But this is a basic factual error, as we showed above at pages 29-30. Most of the offenses listed in section 1101(a)(43) have no interstate commerce element. Under the BIA's initial correct reading of the statute, all the state offenses referred to by their generic names are aggravated felonies, as are all the state offenses incorporating terms "defined in" federal statutes, as are all the state offenses "described in" federal statutes without interstate commerce elements.

Second, the BIA erroneously found that the reference to state convictions in 8 U.S.C. § 1231(a)(4)(B)(ii) "would be superfluous" unless the interstate commerce element were ignored. *Vasquez-Muniz*, 23 I. & N. Dec. at 211. This is another basic mistake, as we showed above at page 31. This reference to state convictions would not be superfluous, because it would encompass convictions under several statutes that do not include interstate commerce elements.

Third, the BIA erroneously found that because foreign statutes lack interstate commerce elements, the penultimate sentence's reference to foreign convictions would be a nullity unless the interstate commerce element is ignored. *Id.* at 211-12. But this is a simple factual error as well, as we showed above at page 30 n.10, because most of the offenses listed in section 1101(a)(43) do not include an interstate

commerce element. Under the BIA's initial correct reading of the statute, a great many foreign offenses are aggravated felonies.

These three mistakes are the entirety of the BIA's reasoning in its second *Vasquez-Muniz* opinion. The BIA did not even bother to explain why it rejected the extensive research and thorough analysis of its first *Vasquez-Muniz* opinion. While an agency may change its interpretation of a statute, the agency's new view is entitled to deference only "if the agency adequately explains the reasons for a reversal of policy." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The BIA's second *Vasquez-Muniz* opinion lacks *any* explanation for the change, much less an adequate explanation.

The BIA's interpretation of the statute is not reasonable, and it is therefore unworthy of deference.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

8 U.S.C. § 1101(a)(43)

The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 3121 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 3121 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport

or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprison-

ment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

No. 14-1096

In the Supreme Court of the United States

JORGE LUNA TORRES, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, designates certain crimes as "aggravated felonies," "whether in violation of Federal or State law" or whether in violation of the law of a foreign country (if the term of imprisonment for the foreign conviction was completed within the previous 15 years). 8 U.S.C. 1101(a)(43). The designated crimes include any offense "described in" a number of sections of the federal criminal code, including the federal statute prohibiting malicious destruction of a building or other property through the use of fire or explosives, 18 U.S.C. 844(i), 8 U.S.C. 1101(a)(43)(E)(i).

The question presented is: Whether an alien has been convicted of arson as "described in" 18 U.S.C. 844(i) when the alien is convicted under a state statute that reaches only conduct prohibited under the federal arson and explosives statute, except that the state statute lacks the interstate-commerce element used in the federal statute as a basis for federal legislative jurisdiction.

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In the Supreme Court of the United States

No. 14-1096

JORGE LUNA TORRES, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 764 F.3d 152. The decisions of the Board of Immigration Appeals (Pet. App. 15a-17a) and of the immigration judge (Pet. App. 18a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2014. A petition for rehearing was denied on November 7, 2014 (Pet. App. 24a). On January 16, 2015, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 9, 2015, and the petition was filed on that date. The petition was granted on June 29, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-44a.

STATEMENT

After records disclosed that petitioner, an alien, had been convicted of attempted third-degree arson in violation of New York Penal Law §§ 110.00 (McKinney 2009) and 150.10 (McKinney 2010), the Department of Homeland Security instituted removal proceedings against him. An immigration judge found that petitioner was removable based on his arson conviction and that the conviction qualified as an aggravated felony, making him ineligible for cancellation of removal. Pet. App. 18a-22a. The Board of Immigration Appeals (Board or BIA) affirmed, *id.* at 15a-17a, and the court of appeals upheld the Board's decision, *id.* at 1a-14a.

1. Since 1988, Congress has provided that any alien who is convicted after admission into the United States of an "aggravated felony" is deportable. 8 U.S.C. 1227(a)(2)(A)(iii); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. J, § 7342, 102 Stat. 4469-4470. Congress has further provided that an alien convicted of an aggravated felony is ineligible for certain forms of discretionary relief from removal, including cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C); asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); and voluntary departure, 8 U.S.C. 1229c(b)(1)(C).[1]

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[1] An aggravated felony conviction does not categorically disqualify an alien from obtaining certain other forms of protection, such as withholding of removal, see 8 U.S.C. 1231(b)(3)(B)(ii), or deferral of removal under the Convention Against Torture and Other

Congress has specified the offenses that constitute aggravated felonies for purposes of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, in 8 U.S.C. 1101(a)(43). In the most frequently used formulation in that section, Congress specified that crimes constitute aggravated felonies if they are "described in" certain provisions of the federal criminal code. See 8 U.S.C. 1101(a)(43)(D)-(E), (H)-(J), (K)(ii) and (iii), (L), (M)(ii), and (N)-(P). For instance, an offense is an "aggravated felony" if it is "described in" the section of the criminal code that prohibits possession of firearms by felons and other prohibited persons, 8 U.S.C. 1101(43)(E)(ii); "described in" a number of laws relating to the production, receipt, and distribution of child pornography, 8 U.S.C. 1101(43)(I); and, as relevant here, "described in" sections of the federal criminal code relating to arson and explosives offenses. Those sections of the criminal code include 18 U.S.C. 844(i), which makes it a crime to "maliciously damage[] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building, vehicle, or other * * * property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." See 8 U.S.C. 1101(a)(43)(E).

Other subparagraphs of the aggravated-felony definition use different language. Some specify that

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Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85; see 8 C.F.R. 208.16(d)(2)-(3), 1208.16(d)(2)-(3). An alien convicted of an aggravated felony is generally barred from seeking readmission following removal, but that bar does not apply if the alien obtains advance consent to apply for readmission. 8 U.S.C. 1182(a)(9)(A)(iii).

offenses are aggravated felonies if they are "defined in" particular provisions of federal law. See, *e.g.*, 8 U.S.C. 1101(a)(43)(B) and (F). Additional subparagraphs use generic labels, specifying that an offense is an aggravated felony if it is "murder, rape, or sexual abuse of a minor," 8 U.S.C. 1101(a)(43)(A), "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G), or an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(i). And still other subparagraphs provide that crimes constitute aggravated felonies if they are offenses "relating to" specified subjects. See, *e.g.*, 8 U.S.C. 1101(a)(43)(R) ("an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year"); see also 8 U.S.C. 1101(a)(43)(Q), (S), and (T).

After listing all of these types of aggravated felonies, Congress specified that "[t]he term" aggravated felony "applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." 8 U.S.C. 1101(a)(43).

2. Petitioner, a native and citizen of the Dominican Republic, is a lawful permanent resident of the United States. Pet. App. 2a. He was charged with arson, grand larceny, possession of burglary tools, and other offenses, in violation of New York law. Certified Administrative Record (C.A.R.) 130, 214-219. He plead-

ed guilty to attempted third-degree arson, under New York statutes that cover only conduct proscribed under the federal statute prohibiting malicious destruction of property by means of fire or explosives, 18 U.S.C. 844(i), except that the New York statutes do not require the connection to interstate commerce that is included in Section 844(i) as the basis for the exercise of the federal government's legislative jurisdiction. See N.Y. Penal Law § 150.10(1) (McKinney 2010) (making it illegal to "intentionally damage[] a building or motor vehicle by starting a fire or causing an explosion," subject to an affirmative defense for damage to a defendant's own property); *id.* § 110.00 (McKinney 2009) (prohibiting attempt). Petitioner was sentenced to one day of imprisonment and five years of probation. Pet. App. 2a; C.A.R. 127, 217-218.

Petitioner thereafter traveled to the Dominican Republic and, in 2006, sought reentry into the United States. C.A.R. 125-126. After a database query disclosed petitioner's conviction for attempted arson in violation of New York law, petitioner was charged with being inadmissible to the United States. Pet. App. 18a-19a; C.A.R. 126, 383-385; see 8 U.S.C. 1101(a)(13)(C)(v).

An immigration judge found that petitioner was inadmissible. The immigration judge also found petitioner ineligible for cancellation of removal because his arson offense was an aggravated felony. Pet. App. 19a-23a.

The Board dismissed petitioner's appeal. Pet. App. 15a-17a. Relying on two published Board opinions construing the INA's aggravated-felony definition, the Board concluded that petitioner's state arson conviction was for a crime "described in" the federal statute

prohibiting malicious destruction of property using fire or explosives. *Id.* at 16a-17a (citing *In re Bautista*, 25 I. & N. Dec. 616 (B.I.A. 2011), and *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (B.I.A. 2002) (en banc)). The Board explained that in *Vasquez-Muniz*, it had held that state or foreign convictions are for offenses "described in" a federal criminal provision, for purposes of the INA's definition of "aggravated felony," if the only difference between the state or foreign statute of conviction and the federal provision is the absence of an interstate-commerce jurisdictional element that is the basis for federal legislative jurisdiction under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3. Pet. App. 16a-17a. Applying those principles, the Board explained, *Vasquez-Muniz* had held that an alien had been convicted of an aggravated felony when he was convicted of possessing a firearm following a felony conviction, rejecting the alien's argument that his offense was not one "described in" federal law because the federal felon-in-possession statute is within Congress's legislative jurisdiction as a result of an interstate-commerce element requiring proof that the firearm was possessed in a manner that affected commerce. *Ibid.*

The Board concluded that petitioner's case was controlled by the application of these principles. Pet. App. 16a-17a. The Board observed that its decision in *Bautista* had already applied the Board's construction of "described in" to conclude that a conviction for attempted arson in violation of the New York arson prohibitions at issue in petitioner's case qualified as an aggravated felony. The Board had noted in *Bautista* that "the sole difference between the federal arson offense set forth at 18 U.S.C. § 844(i) and the

New York state offense is that the federal offense" is brought within federal jurisdiction by an element requiring the property involved in the arson to have been "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." *Id.* at 16a (quoting *Bautista*, 25 I. & N. Dec. at 620). Respondent's arguments "d[id] not persuade" the Board that *Bautista* and *Vasquez-Muniz* "were wrongly decided." *Id.* at 17a.

3. The court of appeals denied a petition for review. Pet. App. 1a-14a. The court noted that, in accepting the Board's conclusion "that a state 'offense described in' 18 U.S.C. § 844(i) need not contain a federal jurisdictional element," *id.* at 1a-2a, it was joining the Fifth, Seventh, Eighth, and Ninth Circuits and rejecting the view of the Third Circuit, *id.* at 3a (discussing *Spacek* v. *Holder*, 688 F.3d 536 (8th Cir. 2012); *Nieto Hernandez* v. *Holder*, 592 F.3d 681 (5th Cir. 2009); *Negrete-Rodriguez* v. *Mukasey*, 518 F.3d 497 (7th Cir. 2008); *United States* v. *Castillo-Rivera*, 244 F.3d 1020 (9th Cir.), cert. denied, 534 U.S. 931 (2001); *Bautista* v. *Attorney Gen. of the U.S.*, 744 F.3d 54 (3d Cir. 2014)).

The court of appeals began by explaining that under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984), it was required "to defer to an agency's reasonable interpretation of the statute it administers." Pet. App. 7a. Here, the court noted, the Board had concluded that the INA provisions referring to offenses that are "described in" various provisions of federal law reached state crimes that matched the federal elements precisely, except for the inclusion of an interstate-commerce jurisdic-

tional element. *Id.* at 6a-7a (discussing *Bautista* and *Vasquez-Muniz*).

The court of appeals concluded that, at a minimum, the Board's interpretation rests on a reasonable construction of the INA's "described in" language. It noted in this regard that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." Pet. App. 8a (citation omitted). Here, the court explained, the aggravated-felony provisions referring to crimes "described in" certain sections of federal law were paired with other aggravated-felony provisions using different formulations, including provisions that referred to crimes "defined in" federal law. *Id.* at 8a-9a. The court joined the Fifth, Seventh, Eighth and Ninth Circuits in concluding "that 'described in' is the broader standard, and that an offense identified in this way need not reproduce the federal jurisdictional element to have immigration consequences." *Id.* at 9a-10a.

The court of appeals disagreed with the Third Circuit—the lone court taking a contrary view—which had concluded that "described in" was naturally read as *narrower* than "defined in," so that "state offenses 'described in' a federal statute must reproduce the federal jurisdictional element to constitute aggravated felonies, while offenses 'defined in' a federal statute need not." Pet. App. 9a (citing *Bautista*, 744 F.3d at 59).

The court of appeals also noted that the Board had found other features of the statute provided support for its textual reading, though the court concluded

that those features did not "inexorably" compel the Board's reading of the statute. Pet. App. 10a-11a.

Because the court of appeals found "persuasive the BIA's reading of the relevant statutory provisions as set forth in *Matter of Bautista* and might well adopt it [itself] were [it] not constrained to do so in any event by *Chevron*," the court "defer[red] to the BIA's 'permissible construction'" of the INA's aggravated-felony provisions. Pet. App. 12a (footnote and citation omitted).

SUMMARY OF ARGUMENT

The portions of the definition of "aggravated felony" under the Immigration and Nationality Act (INA) that apply to offenses "described in" specified sections of the federal criminal code include convictions under state and foreign statutes that are equivalent to the cited federal provisions in every respect except for an interstate-commerce element that is the basis for federal legislative jurisdiction. This construction—adopted by the Board and by all courts of appeals but one—flows from the statutory text, structure, and context. And unlike petitioner's reading, it aligns the statute with a coherent objective—enabling swift removal of aliens who commit serious crimes, regardless of the jurisdiction of prosecution.

A. 1. The Board adopted the best reading of the statutory language. To "describe" a concept is to convey its central features—its "outline," *Webster's Third New International Dictionary* 610 (1986) (*Webster's Third*), or "idea," *The American Heritage Dictionary of the English Language* 490 (5th ed. 2011) (*American Heritage Dictionary*). The central features of criminal offenses are their substantive elements, not the jurisdictional elements that "may limit,

but * * * will not primarily define, the behavior that the statute calls a 'violation' of federal law." *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 18 (2006). Thus, across many doctrines, when courts are called upon to determine whether one sovereign's offense is the equivalent of another's, they set jurisdictional elements aside—a result that the "described in" language indicates that Congress intended here.

2. This prevailing construction of the paragraphs of the aggravated-felony definition that use "described in" is supported by surrounding statutory language. Congress juxtaposed these provisions with narrower "defined in" language in other aggravated-felony provisions. Petitioner's interpretation would fail to give those terms different meanings, because the natural meaning of "defined in" requires exact correspondence. And while petitioner argues that Congress could have used generic labels (such as "arson") if it intended the aggravated-felony definition to include state crimes that did not have a jurisdictional element tied to interstate commerce, Congress could reasonably have concluded that cross-references to specific sections of the federal criminal code conveyed its meaning with respect to some offenses more precisely than a generic label would. The aggravated-felony provision at issue in petitioner's case demonstrates this point, because Congress's incorporation of all crimes "described in" several sections of 18 U.S.C. 844 conveys a meaning both broader and more precise than a reference to generic "arson."

3. Ratification principles provide further support for this construction. In 2003, Congress enacted a new "described in" provision within the aggravated-felony statute, and left intact the many existing "de-

scribed in" provisions. When Congress did so, federal provisions addressing offenses "described in" federal criminal statutes had been uniformly construed to reach state crimes that mirrored all the substantive elements of the federal statutes, but lacked a jurisdictional element. Congress's carrying forward of the "described in" language under these circumstances is evidence that Congress wished to carry forward the then-uniform interpretation of the "described in" phrase.

4. The prevailing interpretation of "described in" as used in the INA's aggravated-felony definition construes the text in line with Congress's stated objective: to enable swift removal of aliens who commit serious crimes, "whether in violation of Federal or State law" or, subject to a recency requirement, foreign law. 8 U.S.C. 1101(a)(43). Petitioner's construction would disserve that objective, and give the aggravated-felony provisions a "limited and * * * haphazard" scope. *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009). Under petitioner's view, the aggravated-felony provisions would exclude state and foreign convictions for many of the gravest aggravated felonies—such as selling a child for use in child pornography; receiving explosives for use in injuring, killing, or intimidating another; and receiving a ransom for the release of a kidnapped person—because of the interstate-commerce jurisdictional element in the relevant federal statutes. At the same time, on petitioner's view, the statute would reach state offenses that are less grave by any measure, such as possessing a firearm not identified by a serial number or failing to appear before a court on a felony charge that carried a possible term of at least two years' imprisonment.

Petitioner cannot offer any sensible explanation for the patchwork that his reading produces. Petitioner misunderstands the role of jurisdictional elements in positing that Congress regarded convictions under state and foreign laws paralleling the federal statutes regarding child pornography, arson and explosives, ransoms, and other offenses as materially less serious than their federal counterparts because convictions can be obtained in state and foreign courts without establishing a connection to interstate or foreign commerce. Congress's inclusion of a commerce element in federal statutes concerning these serious crimes does not reflect an idiosyncratic view that persons who commit such crimes with a connection to commerce are especially culpable, but rather represents the link Congress made between the crime involved and the exercise of its enumerated powers. Petitioner's view is particularly implausible because many of the state and foreign convictions that petitioner would exclude are for conduct that would very likely involve some connection to commerce, such as distributing child pornography, possessing firearms, and transmitting extortion or ransom demands. The absence of an interstate-commerce showing when these offenses are prosecuted under state and foreign statutes simply reflects that state and foreign governments, which have plenary police powers, have no occasion to require findings regarding commerce in order to establish their jurisdiction.

There likewise is no merit to petitioner's suggestion that the "described in" provisions were designed to exclude state and foreign convictions on the theory that they generally involve far less culpable underlying conduct than federal convictions. When Congress

wanted to capture only particularly serious forms of an offense in the aggravated-felony provisions, it did so explicitly—by reaching, for instance, only those theft or burglary offenses for which the defendant received a term of imprisonment of one year or more; only those frauds that caused a loss to victims of at least $10,000; and only those money laundering crimes that involved at least $10,000. In contrast, using state or foreign prosecution as a proxy for lesser gravity would make little sense. States are the sovereigns in the federal framework with principal responsibility for punishing crimes—including the most serious offenses. And in the specific context of arson and explosives crimes, Congress expressly directed that federal prosecution was appropriate only if state officials lacked resources or authority to address the underlying crimes. Similarly, foreign prosecution makes no sense as a proxy for offense seriousness—because an offense's having been prosecuted by a foreign sovereign is likely to reflect nothing more than that the crime occurred outside the United States. Further, petitioner offers no reason why a Congress that expressly sought to reach state and foreign crimes would have used the identity of the prosecuting sovereign as a proxy for offense seriousness only with respect to certain federal crimes having interstate-commerce elements.

5. The legislative history provides additional support for the conclusion that Congress intended the meaning that flows from the text and context of the "defined in" provisions. Members of Congress consistently explained that the aggravated-felony provisions were designed to apply to aliens convicted of particularly serious offenses in state courts. They

reinforced that intent when Congress amended the statute to expressly provide that state and foreign offenses were included. That amendment was intended to ratify a Board decision that had eschewed distinctions on the basis of whether a conviction was accomplished under state or federal law. And when Members of Congress explained the addition of crimes to the aggravated-felony definition, they routinely described those provisions as extending aggravated-felony treatment to particular areas of substantive misconduct—like "child pornography." They never suggested that such misconduct would be covered only if in violation of federal law.

B. 1. Any ambiguity concerning the meaning of the aggravated-felony provisions in the INA should be resolved based on deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Board is entitled to deference to its interpretation of the INA, because Congress has charged the Attorney General with administration and enforcement of the statute in removal proceedings, and the Attorney General has delegated her authority to the Board. Petitioner is mistaken in arguing that deference is unwarranted because the INA attaches criminal penalties to certain immigration misconduct, when committed by (or with respect to) those who are inadmissible or removable on numerous grounds—including grounds that relate to aggravated-felony convictions. This Court's precedents are not consistent with petitioner's argument that agencies are stripped of deference in their construction of ambiguous terms whenever those terms might have criminal implications—a principle that, if accepted, would se-

verely undermine the administration of the immigration laws.

2. The Board's interpretation of the aggravated-felony provision is, at minimum, a reasonable one. As all courts but one have agreed, there is ample support for the Board's view of the statute. The Board reasonably concluded that petitioner's reading was not the best when the statutory language is read in context, and that it would produce unreasonable outcomes. Although petitioner objects to particular sentences in the Board's opinion as overstatement, his objections misunderstand the Board's analysis.

ARGUMENT

UNDER THE AGGRAVATED-FELONY DEFINITION IN THE IMMIGRATION AND NATIONALITY ACT, ATTEMPTED ARSON IN VIOLATION OF NEW YORK LAW IS AN OFFENSE "DESCRIBED IN" 18 U.S.C. 844(i), BARRING ATTEMPTED MALICIOUS DESTRUCTION OF PROPERTY USING FIRE AND EXPLOSIVES

The INA defines certain offenses as aggravated felonies, "whether in violation of Federal or State law" or in violation of foreign law (in cases where the alien's foreign term of imprisonment was completed within the previous 15 years). 8 U.S.C. 1101(a)(43). Those aggravated-felony offenses include the crimes "described in" a number of sections in the federal criminal code, including, as relevant here, the crime "described in" the federal statute prohibiting malicious destruction of property by use of fire or explosives, 18 U.S.C. 844(i). See 8 U.S.C. 1101(a)(43)(E).

As the Board concluded, and as courts of appeals uniformly held until a single recent decision, a state statute contains the crime "described in" a federal provision when the state statute is identical to the

federal provision in every respect except for the lack of an interstate-commerce element that is the basis for federal legislative jurisdiction. Because petitioner was convicted of attempted arson under a New York statute that is equivalent to the federal arson statute in all respects except for its omission of such a jurisdictional element, petitioner was convicted of an aggravated felony.

A. The Prevailing Construction Of The Aggravated-Felony Definition Is Supported By Text, Structure, and Context

Given their most natural reading, the provisions of the INA's aggravated-felony definition referring to crimes "described in" particular federal statutory sections encompass state offenses that mirror the referenced federal offenses in all respects except for an interstate-commerce element that is the basis for federal legislative jurisdiction. The aggravated-felony provisions thereby enable the swift removal of aliens convicted of the most serious crimes, regardless of the jurisdiction of conviction. Petitioner's contrary approach deviates from the most natural reading of the statutory text, and would give the aggravated-felony provisions the "limited and * * * haphazard" scope that this Court has previously found Congress would not have intended them to have. *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009).

1. The statutory text supports the Board's reading

The interpretation of the aggravated-felony provision adopted by the Board and decisively favored by the courts is the most natural reading of the statutory language—particularly against a legal backdrop that

has long distinguished between substantive and jurisdictional elements of criminal offenses.

The text of the aggravated-felony definition that reaches state and foreign crimes "described in" specified sections of the federal criminal code is most naturally read to reach state and foreign crimes that are substantively equivalent to the specified federal offenses, and differ only in that they lack an interstate-commerce element that supports federal jurisdiction. Dictionaries define "describe" as "[t]o convey an idea or impression of," *Espinal-Andrades* v. *Holder*, 777 F.3d 163, 168 (4th Cir. 2015), petition for cert. pending, No. 14-1268 (filed Apr. 22, 2015) (brackets in original) (quoting *American Heritage Dictionary* 490); "to mark out: trace or traverse the outline of"; "to represent" an idea or a thing through a different medium," *Webster's Third* 610; or to "denote" or "represent," *Random House Webster's Unabridged Dictionary* 538 (2d ed. 2001). Thus, describing entails conveying central features in a different context, not precise replication. See *United States* v. *Beasley*, 12 F.3d 280, 283 (1st Cir. 1993) (Breyer, J.) (explaining that a federal drug statute "describe[s] behavior commonly called 'drug trafficking,'" including "such activities as the making, importing, exporting, distributing, or dispensing, of drugs," so that state statutes that "criminalize some[] or all, of these same activities * * * would create 'an offense *described in*' the federal statute") (quoting 28 U.S.C. 994(h)(2)).

The application of the "described in" language to offenses with jurisdictional elements is straightforward, because it is settled that jurisdictional elements are not substantive or material elements of an offense. As this Court has put it, interstate commerce ele-

ments are "terms of art" in federal statutes, whose purpose is to "connect[] the congressional exercise of legislative authority with the constitutional provision (here, the Commerce Clause) that grants Congress that authority."[2] *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 17-18 (2006) (citing *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995), and *Russell* v. *United States*, 471 U.S. 858, 859 (1985)). Thus, "jurisdictional language may limit, but it will not primarily define, the behavior that the statute calls a 'violation' of federal law." *Id.* at 18. The Model Penal Code draws the same line, distinguishing between "material elements" that define the *malum prohibitum* and jurisdictional elements that merely establish a sovereign's power to regulate. Model Penal Code § 2.02, at 227 (1985) (defining "material element[s]" to include all "matters relating to the harm or evil sought to be prevented by the law defining an offense," and exclude "[f]acts that relate to * * * jurisdiction, venue or limitations").

Because jurisdictional elements are not substantive features of the offenses set out in criminal statutes, courts often set jurisdictional elements aside under statutes that call for comparison of state and federal crimes. The federal three-strikes statute, for instance, increases the sentence of persons convicted of serious violent felonies. "[S]erious violent felony" is defined, using language parallel to the aggravated-felony definition, to include any "Federal or State

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[2] Legislative jurisdiction, involving Congress's power to regulate certain conduct, is thus distinct from subject-matter jurisdiction, which involves "the courts' statutory or constitutional *power* to adjudicate the case." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (citation omitted).

offense, by whatever designation and wherever committed, consisting of murder (as *described in* section 1111); manslaughter other than involuntary manslaughter (*as described in* section 1112); assault with intent to commit murder (*as described in* section 113(a)); * * * aggravated sexual abuse and sexual abuse (*as described in* sections 2241 and 2242); abusive sexual contact (*as described in* sections 2244 (a)(1) and (a)(2)); * * * aircraft piracy (*as described in* section 46502 of Title 49); robbery (*as described in* section 2111, 2113, or 2118); [and] carjacking (*as described in* section 2119)." 18 U.S.C. 3559(c)(2)(F)(i) (emphases added). Courts have uniformly interpreted this provision to reach offenses under state statutes that parallel the relevant federal provisions, even if the state statutes lack a federal jurisdictional element. See *United States* v. *Rosario-Delgado*, 198 F.3d 1354 (11th Cir. 1999) (per curiam); *United States* v. *Wicks*, 132 F.3d 383, 386-387 (7th Cir. 1997), cert. denied, 523 U.S. 1088 (1998); *United States* v. *Dittrich*, 100 F.3d 84, 86 (8th Cir. 1996), cert. denied, 520 U.S. 1178 (1997); *United States* v. *Farmer*, 73 F.3d 836 (8th Cir.), cert. denied, 518 U.S. 1028 (1996); see also *United States* v. *Ferguson*, 211 F.3d 878, 882 n.1, 886 (5th Cir.) (without analysis), cert. denied, 531 U.S. 909 (2000); *United States* v. *Kaluna*, 192 F.3d 1188 (9th Cir. 1999) (not disputed by parties), cert. denied, 529 U.S. 1056 (2000).

Similarly, this Court has explained that jurisdictional elements are properly set aside when comparing state and federal laws in applying the Assimilative Crimes Statute, 18 U.S.C. 13(a), under which assimilation of a state offense is appropriate only if the same acts or omissions are not punishable by federal stat-

ute. *Lewis* v. *United States*, 523 U.S. 155, 165 (1998) ("[I]t seems fairly obvious that the Act will not apply where both state and federal statutes seek to punish approximately the same wrongful behavior—where, for example, differences among elements of the crimes reflect jurisdictional, or other technical, considerations, or where differences amount only to those of name, definitional language, or punishment."); *id.* at 183 (Kennedy, J., dissenting) ("[A] jurisdictional element need not by itself allow assimilation, if all substantive elements of the offenses are identical.").

Similar principles apply to determinations of whether offenses under U.S. and foreign law are the same. Extradition treaties often require dual criminality, under which "the act done on account of which extradition is demanded must be considered a crime by both parties." *Wright* v. *Henkel*, 190 U.S. 40, 58 (1903); see *Collins* v. *Loisel*, 259 U.S. 309, 312 (1922). Courts applying this test have found dual criminality when a federal statute contains an interstate-commerce element that has no counterpart in foreign law, explaining that the interstate-commerce element is "but a jurisdictional element," while the "substantive crime" remains the same. *United States* v. *Herbage*, 850 F.2d 1463, 1466 (11th Cir. 1988), cert. denied, 489 U.S. 1027 (1989); see *Ross* v. *United States Marshal for E. Dist. of Okla.*, 168 F.3d 1190, 1196 (10th Cir. 1999) (use of mails is "merely a jurisdictional requirement which makes the underlying crime federal in nature"); *Emami* v. *United States Dist. Ct. for N. Dist. of Cal.*, 834 F.2d 1444, 1450 (9th Cir. 1987) ("It does not matter that the German [fraud] statute does not contain the jurisdictional element of use of the mails" because "[t]he substantive conduct each statute

punishes is functionally identical."). A number of extradition treaties make this point expressly. See, *e.g.*, *United States* v. *Sensi*, 879 F.2d 888, 894 (D.C. Cir. 1989) (noting dual-criminality finding was "bolstered" by treaty provision that "when United States Federal jurisdiction is based upon interstate transport or transportation or the use of the mails or of interstate facilities, these aspects [are] jurisdictional only") (citation omitted).

Jurisdictional elements likewise are not ordinarily regarded as substantive or material with respect to mens rea. "[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa* v. *United States*, 556 U.S. 646, 652 (2009). And even when a statute contains no express mental-state requirement, courts generally imply one, applying the principle that "a defendant generally must 'know the facts that make his conduct fit the definition of the offense.'" *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Staples* v. *United States*, 511 U.S. 600, 608 n.3 (1994)). Despite these general principles, however, courts have consistently held that because an interstate-commerce element is "purely jurisdictional" rather than "substantive," a defendant need not know the facts that establish an interstate-commerce element. *United States* v. *Blackmon*, 839 F.2d 900, 907 (2d Cir. 1988); see *United States* v. *Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970) ("The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction."), cert. denied, 402 U.S. 945 (1971); *United States* v. *Squires*, 581 F.2d 408, 410 (4th Cir. 1978) (inter-

state-commerce element is "merely jurisdictional" and "not material to the substantive offense"); see also, *e.g.*, *United States* v. *Jinian*, 725 F.3d 954 (9th Cir. 2013); *United States* v. *Lindemann*, 85 F.3d 1232, 1241 (7th Cir.), cert. denied, 519 U.S. 966 (1996); *United States* v. *Bryant*, 766 F.2d 370, 375 (8th Cir. 1985), cert. denied, 474 U.S. 1054 (1986).[3]

2. The contrasting language of the aggravated-felony subsections supports the Board's reading

a. The construction of the relevant paragraphs of 8 U.S.C. 1101(a)(43) that preserves the established distinction between substantive and jurisdictional elements is not only consistent with the meaning of "described in" when considered alone, but also is strongly supported by the surrounding statutory language. The paragraphs in 8 U.S.C. 1101(a)(43) that refer to crimes "described in" particular federal statutory sections are juxtaposed with other provisions in Section 1101(a)(43) that refer to crimes "defined in" other federal statutory sections. See 8 U.S.C. 1101(a)(43)(B) and (C). "Defined in" is the more restrictive of these two terms, as the Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits have con-

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[3] This legal backdrop demonstrates the error in petitioner's assertion (Br. 17) that the prevailing construction of "described in" in 8 U.S.C. 1101(a)(43) creates a "Pandora's box[]," by construing paragraphs in the aggravated-felony definition to reach "not just the designated [federal] offenses but a nebulous penumbra of similar offenses." Because the "described in" language captures a distinction between substantive or material elements and purely jurisdictional ones that courts have drawn without difficulty for years, it is unsurprising that when courts construed the three-strikes and aggravated-felony provisions to track the same distinction, their decisions did not in fact give rise to an "awful lot of litigation." Pet. Br. 18.

cluded, see Pet. App. 9a; see also *Espinal-Andrades*, 777 F.3d at 168, because "defined in" is naturally read to require a precise match between provisions. See *Webster's Third* 592 (stating that "define" means "to determine the precise signification of"); *Black's Law Dictionary* 515 (10th ed. 2014) (*Black's*) ("To state or explain explicitly," "To fix or establish (boundaries or limits)," "To set forth the meaning of (a word or phrase)."). The construction of the term "described in" adopted by the Board and all but one court of appeals thus draws additional support from statutory context, under the principle that "[t]he use of different terms within related statutes generally implies that different meanings were intended." *United States* v. *Bean*, 537 U.S. 71, 76 n.4 (2002) (quoting 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 46:06, at 194 (6th ed. 2000)).

Petitioner's reading of Section 1101(a)(43) would violate that interpretive principle. He construes "described in" to convey the same meaning that "defined in" conveys—treating provisions of federal law as "fix[ing] or establish[ing]" the boundaries of, "set[ting] forth the meaning of," *Black's* 515, or "determin[ing] the precise signification of," *Webster's Third* 592, aggravated-felony categories, irrespective of whether "described in" or "defined in" is used. Petitioner seeks to account for the identical meaning he accords these two different terms by asserting (Br. 18-20) that Congress used "defined in" only with respect to "definitions" in federal statutes. But ordinary federal criminal statutes are themselves definitions, in that they define or specify the elements of criminal offenses. Accordingly, federal law often speaks of crimes or offenses "defined in" federal criminal provi-

sions. See, *e.g.*, 18 U.S.C. 1956(h); 18 U.S.C. 2113(d); 18 U.S.C. 924(c)(5); 18 U.S.C. 2320(h)(1); 18 U.S.C. 2113(e). For example, the federal drug statutes make it illegal for any person to attempt to commit or conspire to commit "any offense defined in" the federal provisions outlawing importation and exportation of controlled substances. 21 U.S.C. 963. A provision establishing mandatory minimum sentences for violent crimes against children applies "if the crime of violence is kidnapping (as defined in section 1201) or maiming (as defined in section 114)." 18 U.S.C. 3559(f)(2). And in one particularly striking example for present purposes, Congress paired "defined in" with the arson and explosives provisions in Section 844—squarely contradicting petitioner's suggestion that "defined in" could not be paired with arson and explosives offenses in Section 1101(a)(43)(E)(i) because the arson and explosives statutes do not set out "definitions." See 18 U.S.C. 844(n) (establishing penalties applicable to "a person who conspires to commit any offense defined in this chapter").[4]

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[4] The Board's interpretation of the statutory text draws additional support from an INA provision that prohibits the early removal of aliens held in state custody for offenses that are "described in" particular federal provisions. 8 U.S.C. 1231(a)(4)(B)(ii). Section 1231(a)(4)(B)(ii) permits the Attorney General to remove "an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien" requests the removal, and, *inter alia*, "the alien is confined pursuant to a final conviction for a nonviolent offense (*other than an offense described in section 1101(a)(43)(C) or (E) of this title*)." *Ibid.* (emphasis added). On the prevailing reading of 8 U.S.C. 1101(a)(43)(E), this provision in 8 U.S.C. 1231(a)(4)(B)(ii) makes sense: It ensures that aliens who have been convicted under state law of an array of gun and explo-

b. Petitioner argues (Br. 20-21) that "if Congress had intended to include" all state offenses that match the substantive elements of federal arson in the aggravated felony definition, it "would have used the generic term 'arson,' rather than stating 'an offense described in' 18 U.S.C. § 844(i)." That argument is mistaken. Just because Congress determined that a generic label most accurately captures *some* crimes it wanted to include in the definition of aggravated felony does not mean that Congress must have concluded that generic labels best capture *every* such crime. See *Negrete-Rodriguez* v. *Mukasey*, 518 F.3d 497, 503 (7th Cir. 2008) ("[I]t does not follow that, because Congress has defined *some* crimes in general terms, it had to define *all* crimes in general terms in order for the offense's state law counterpart to be included within the definition of an 'aggravated felony.'"). Instead, Congress could reasonably conclude that references to substantive offenses described in other federal statutes captured more precisely other crimes it wanted to include.

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sives offenses are not removed before they complete their sentences. It bars, for instance, early removal of persons held in state custody based on convictions for transactions involving stolen explosives; shipping explosives to felons or other prohibited persons; making bomb threats; unlawfully possessing a firearm as a felon or other prohibited person; and transferring a gun for use in a felony. On petitioner's view (Br. 31), however, this reference to Section 1101(a)(43)(E) would not make much sense. It would allow removal of aliens who committed those many serious firearms and explosives offenses before their sentences were complete, while barring early removal only of aliens with state convictions for the handful of state gun crimes the federal counterparts of which lack an interstate-commerce element—offenses such as possessing a firearm with no serial number, 26 U.S.C. 5861(i), or an unlawfully imported gun, 26 U.S.C. 5861(k).

The subparagraph of Section 1101(a)(43) at issue in petitioner's case illustrates this point, because Congress's incorporation of all offenses "described in" specified provisions of 18 U.S.C. 842 and 844 conveys a meaning that is both broader and more precise than a reference to generic "arson." First, as the court of appeals noted, that subparagraph sweeps more broadly than generic "arson," because it incorporates various explosives-related offenses as well. Pet. App. 9a & n.2; see 8 U.S.C. 1101(a)(43)(E)(i). Thus, petitioner's proposed generic formulation would have left out much of what is covered by the language Congress enacted. See Pet. Br. 23 n.7 (conceding that the aggravated-felony provision at issue here "include[s] several explosives offenses [that are] in 18 U.S.C. § 844 other than arson").

Further, Congress's incorporation of arson crimes through statutory cross-reference achieves greater clarity than would have been achieved through reference to "generic 'arson'"—a term that could pose interpretive difficulties. The meaning of "arson" has changed significantly over time and still varies today among jurisdictions. At common law, arson required "the malicious burning of the dwelling house of another." 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.3, at 239 (2d ed. 2003). But model enactments—especially the Model Arson Law and the Model Penal Code—have substantially expanded the narrow common-law rule, and their somewhat different proposals for the offense's scope have been adopted to varying degrees in different States. See generally John Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295 (1986). In the wake of those reform efforts, some of the limits of common-law arson survive

almost nowhere (such as the requirement that the property destroyed by an arsonist be a "dwelling"), and there is substantial disagreement regarding other elements, including whether the property burned must belong to a person other than the arsonist, see *id.* at 387-399, 407, whether an arsonist may cause damage through use of explosives or only through fire, *id.* at 364, whether inchoate crimes are covered, *id.* at 398-403, and what mens rea applies, *id.* at 403-436. By referring to Section 844(i), Congress avoided those ambiguities in the meaning of the generic term.

The provisions elsewhere in federal law petitioner cites (Br. 20-23) that do refer to "arson" standing alone reinforce this point, because they demonstrate that such references are not consistently understood as referring to arson as set out in Section 844(i). For instance, the reference to "arson" in the Major Crimes Act applicable in Indian country, 18 U.S.C. 1153, has been understood as a reference to the distinct provision, 18 U.S.C. 81, concerning arson in federal enclaves. See *United States* v. *Doe*, 572 F.3d 1162, 1164 (10th Cir. 2009), cert. denied, 559 U.S. 974 (2010); *United States* v. *Auginash*, 266 F.3d 781, 783 (8th Cir. 2001). The reference to "arson" petitioner identifies in 18 U.S.C. 1111(a) likewise has been understood as a reference to Section 81. *United States* v. *Bedonie*, 913 F.2d 782 (10th Cir. 1990), cert. denied, 501 U.S. 1253 (1991). And the references to "arson" on which petitioner relies in 18 U.S.C. 1961(1)(A) have been understood as an incorporation of arson however that crime is defined in the law of a particular State. See, *e.g.*, *United States* v. *Zizzo*, 120 F.3d 1338, 1356 (7th Cir.), cert. denied, 522 U.S. 998 (1997); *United States* v. *Anderson*, 782 F.2d 908, 917 (11th Cir. 1986). Those

references thus disprove petitioner's assertion that a reference to the "generic term 'arson'" would have been an effective substitute for a reference to the substantive arson and explosives offenses "described in" 18 U.S.C. 844(i).

More broadly, consideration of the aggravated-felony definition as a whole underscores how statutory cross-references often enhance precision. Section 1101(a)(43) includes many crimes other than the arson and explosives offenses in Section 844(i) that cannot easily be described using generic labels. See *Negrete-Rodriguez*, 518 F.3d at 503 (noting that many offenses "are not susceptible to being easily described in general terms," such as the firearms-related offenses in Sections 922(g)(4) and (*o*)). Petitioner's suggestion that Congress would have used a generic label in any case in which it wanted to reach state crimes notwithstanding the absence of a jurisdictional element is particularly implausible given the existence of those federal crimes, which illustrate that it often makes more sense to describe "offenses by reference to the statutory provision where they were located rather than conjuring up an awkward general descriptor, or having to recopy several parts of a statutory scheme." *Ibid.*

c. Petitioner observes (Br. 24) that Congress could have used other language that might have been more explicit as to the status of jurisdictional elements. But that point does not aid petitioner. Congress could have expressly addressed the status of jurisdictional elements in either direction—by expressly stating that such elements are to be considered, or by expressly stating that they are not relevant. Cf. *United States* v. *Rivera*, 996 F.2d 993, 995 (9th Cir. 1993)

(noting in interpreting similar statutory language that it was "equally true" that Congress could have expressly said that "predicate offenses are limited to federal law" and that Congress "could have said predicate offenses are [covered] whether they violate state or federal law"). To be sure, in two entirely different provisions, Congress has expressly addressed jurisdictional elements and has clarified that they are irrelevant to determining whether a state offense is covered under some statutory provision. See 18 U.S.C. 3142(e)(2)(A) and (f)(1)(D). But those two unrelated provisions do not shed light on the meaning of the distinct cross-references in the INA's comprehensive aggravated-felony definition in 8 U.S.C. 1101(a)(43). Nor do those two provisions generate the type of interpretive problem from which petitioner's view suffers by assigning the same meaning to "defined in" and "described in." While there is a "well-established canon of statutory interpretation that the use of different words or terms *within a statute* demonstrates that Congress intended to convey a different meaning for those words," *Spencer Enterprises, Inc.* v. *United States*, 345 F.3d 683, 689 (9th Cir. 2003) (emphasis added; citation omitted), there is no such canon as to different words in such unrelated statutes, enacted years apart by different Congresses.

3. Congress's enactment of additional "described in" language in 2003 further supports the Board's construction

Congress's amendment of the aggravated-felony definition at a time when "described in" provisions were uniformly understood to reach state offenses without regard to jurisdictional elements provides additional support for the meaning of "described in"

that flows from the text and context of 8 U.S.C. 1101(a)(43). "If a word or phrase has been given a uniform interpretation by inferior courts , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)); see, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 644-645 (1998) (finding ratification based on uniform administrative and judicial precedent).

That principle applies here. In 2003, Congress amended the aggravated-felony provision, leaving in place existing paragraphs incorporating all offenses "described in" specified federal criminal statutes, and adding a new paragraph reaching offenses "described in" additional provisions relating to human trafficking and similar acts. See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(b)(5), 117 Stat. 2879; 8 U.S.C. 1101(a)(43)(K)(iii). At the time Congress did so, the "described in" phrasing was uniformly understood to reach state offenses that mirror federal provisions' substantive elements, despite the omission of a federal jurisdictional element. Courts had uniformly so held in the context of the federal three-strikes provision, which provided enhanced sentences based on crimes "described in" particular provisions of federal law. See *Rosario-Delgado*, 198 F.3d at 1357; *Wicks*, 132 F.3d at 386-387; *Dittrich*, 100 F.3d at 86; *Farmer*, 73 F.3d at 842-843; *Ferguson*, 211 F.3d at 882 n.1, 886; *Kaluna*, 192 F.3d at 1191-1192. That approach had also been applied to the "described in" language in the INA's aggravated-

felony provision, with the Ninth Circuit doing so in *United States* v. *Castillo-Rivera*, 244 F.3d 1020, cert. denied, 534 U.S. 931 (2001), and the Board doing so en banc, after vacating an earlier Board opinion, in *In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 212-213 (B.I.A. 2002). No court had adopted a contrary approach. Congress's carrying forward the "described in" language against this backdrop provides additional support for adhering to the construction of "described in" that was uniform at the time of the 2003 enactment.

4. The Board's approach gives Section 1101(a)(43) a coherent interpretation, avoiding the "limited and haphazard" patchwork that would result on petitioner's view

a. The interpretation of the aggravated-felony provisions adopted by the Board and most courts of appeals reads the statute in line with the purpose obvious in the text—enabling swift removal of aliens who commit serious crimes, regardless of their jurisdiction of conviction. The purpose of removing aliens who pose a threat to the public by virtue of serious criminal conduct was the through-line in Congress's explanations of the aggravated-felony provision. See H.R. Rep. No. 22, 104th Cong., 1st Sess. 6-7 (1995) (1995 House Report) (explaining that, as a result of past congressional and Executive Branch policies, "many aliens who committed serious crimes were released into American society after they were released from incarceration, where they then continue to pose a threat to those around them"); *Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary (Criminal Aliens I)*, 101st Cong., 1st Sess. 1-3 (1989) (statement of Rep.

Morrison, Chairman). The Board's interpretation of Section 1101(a)(43) is the only sensible understanding of Congress's directive that the serious crimes identified in that section are to be treated as aggravated felonies, "whether in violation of Federal or State law" or whether "in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." 8 U.S.C. 1101(a)(43). Petitioner's approach, in contrast, would disserve that objective, by carving out from coverage many aliens who are convicted of their serious crimes under state and foreign statutes—merely because the state and foreign statutes lack an interstate-commerce jurisdictional element.

Moreover, petitioner's construction of the "described in" provisions would produce the "limited and * * * haphazard" coverage of state and foreign offenses that this Court has explained Congress would not have intended. *Nijhawan*, 557 U.S. at 40 (rejecting argument that aggravated-felony paragraph covering fraud convictions involving losses greater than $10,000 should be construed to require that loss amount must have been proven to the jury, because of the "limited and * * * haphazard" coverage of fraud provisions that would result); see *United States* v. *Hayes*, 555 U.S. 415, 426 (2009) (relying on similar "[p]ractical considerations" concerning haphazard coverage of state offenses in construing provision pertaining to crimes of domestic violence); *Beasley*, 12 F.3d at 284 (Breyer, J.) (eschewing reading of "described in" language that would create a "crazy-quilt" of statutory coverage, due to disparate treatment of state and federal offenses).

Petitioner would create just that type of patchwork, by reading the aggravated-felony provision to exclude state and foreign convictions for many of the gravest aggravated felonies, while reaching state offenses that, while serious, are less grave by any measure. For instance, state and foreign offenses that petitioner would exclude because Congress exercised its legislative jurisdiction using an interstate-commerce element include all child-pornography-related offenses, including even selling a child for the purpose of child pornography, see 8 U.S.C. 1101(a)(43)(I); receiving explosives for the purpose of use in killing, injuring, or intimidating another, see 8 U.S.C. 1101(a)(43)(E)(i); demanding or receiving a ransom for a kidnapping, see 8 U.S.C. 1101(a)(43)(H); and possessing a firearm following a felony conviction, see 8 U.S.C. 1101(a)(43)(E)(ii). In contrast, on petitioner's view, state and foreign offenses that would qualify as aggravated felonies—because Congress chose not to include an interstate-commerce element—include operating an unlawful gambling business, see 8 U.S.C. 1101(a)(43)(J); 18 U.S.C. 1955; possessing a firearm not identified by a serial number, 26 U.S.C. 5861(i); and possessing a firearm that was unlawfully imported, 26 U.S.C. 5861(k).

Petitioner's approach would generate "limited and * * * haphazard" results, *Nijhawan*, 557 U.S. at 40, in another respect, because his narrow reading of the "described in" provisions excludes crimes more serious than those he acknowledges would be brought within the aggravated-felony provision through paragraphs of Section 1101(a)(43) using different linguistic formulations. Petitioner does not dispute that state and foreign convictions for offenses identified in Sec-

tion 1101(a)(43) using generic labels do qualify as aggravated felonies. And the state offenses undisputedly brought within the aggravated-felony provision as a result include many crimes involving less dangerous conduct than the exceptionally grave offenses that petitioner would read out through his narrow construction of "described in." For instance, aggravated-felony provisions cast in generic terms reach all convictions relating to failure to appear before a court on a felony charge that carried a possible term of at least two years' imprisonment, 8 U.S.C. 1101(a)(43)(T); any fraud involving a loss of $10,000 or more, 8 U.S.C. 1101(a)(43)(M)(i); and any offense relating to managing a prostitution business, 8 U.S.C. 1101(a)(43)(K). In light of the breadth of coverage of Section 1101(a)(43), it is not plausible that Congress intended to exclude state offenses involving child pornography, explosives, arson, and ransom demands, based solely on the absence of the federal statute's jurisdictional element.

b. In an attempt to give coherence to his construction, petitioner suggests (Br. 35-36) that the statute could have reflected an intent to exclude certain state and foreign offenses on the ground that the absence of an interstate-commerce element made persons who commit the state and foreign crimes substantially less culpable than their federal counterparts. But that suggestion misunderstands the role of interstate-commerce jurisdictional elements, and would not make petitioner's statutory reading any less of a crazy quilt.

Because the federal government lacks a general police power, Congress cannot enact laws regulating criminal activity unless the laws are connected to an

enumerated power, such as the Commerce Clause. See, *e.g.*, *Bond* v. *United States*, 134 S. Ct. 2077, 2086-2087 (2014). Accordingly, Congress's decision to proscribe forms of criminal activity when they affect commerce does not reflect a highly idiosyncratic view of when crimes such as child-pornography distribution, unlawful firearms possession, and extortion are sufficiently serious to be proscribed; rather, the interstate-commerce elements in those statutes represent the link Congress prescribed between the substantive offense and the exercise of one of its enumerated powers. And the existence of such an element typically reflects a congressional intent that the statute sweep broadly in its coverage. See, *e.g.*, *Russell*, 471 U.S. at 859 (explaining that in drafting federal arson statute to reach malicious destruction by fire or explosives of "'any building used in any activity affecting interstate or foreign commerce,'" Congress "expresse[d] an intent * * * to exercise its full power under the Commerce Clause") (quoting 18 U.S.C. 844(i)); *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (per curiam) (describing commerce elements as "words of art" that "ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power").

Petitioner is also unable to offer any reason why Congress would have regarded as materially and categorically more serious those crimes that are covered by the aggravated-felony provision as offenses "described in" federal law, based on the interstate-commerce element used as a basis for federal legislative jurisdiction—let alone so much more serious that Congress would have wished to exclude all convictions under the substantively equivalent state and foreign

statutes. He asserts (Br. 35) that Congress could have seen a commercial nexus as related to culpability for felon-in-possession crimes, but offers no account of why Congress would have seen a felon's possession of a firearm as materially more culpable if the firearm was manufactured outside the State of unlawful possession, thereby satisfying the interstate-shipment requirement of 18 U.S.C. 922(g), instead of being manufactured by an in-state gun company. See Pet. Br. 35. Similarly, beyond mere assertion (*ibid.*), petitioner identifies no reason why persons who obtained or sent child pornography over the Internet or through the mail would pose a materially greater danger to children than persons who received or distributed child pornography in person.

The implausibility of petitioner's reading is compounded by the fact that many of the state and foreign offenses petitioner would exclude on his connection-to-interstate-commerce theory are crimes that all but inevitably involve some connection to interstate or foreign commerce in any event, regardless of the jurisdiction of prosecution. It is surely the rare felon who manages to acquire a gun that has never been transported in commerce; the rare blackmailer or ransom-seeker who conveys demands by courier rather than by mail, fax, phone, or the Internet; and the rare distributor or consumer of child pornography who disseminates or acquires child pornography only through in-person transactions. The absence of proof of a commerce connection when those crimes are prosecuted in state or foreign court simply reflects that there was no reason for state or foreign governments (with their plenary police powers) to require findings regarding the connection to commerce that

has relevance to federal legislative jurisdiction. That makes particularly far-fetched petitioner's theory that Congress would have carved out all state and foreign offenses because it saw offenses with some commercial nexus as particularly culpable.

Petitioner's reading, moreover, would generate haphazard coverage even if petitioner were correct that there is some incremental difference in culpability for some offenses depending on whether a connection to interstate commerce is established. Congress included in the aggravated-felony definition many offenses less grave than the most local acts of selling a child for the purpose of child pornography, maliciously destroying property by means of fire or explosives, or demanding a ransom for the release of a kidnapped person. See pp. 33-34, *supra*. Those inclusions cannot be reconciled with petitioner's hypothesis that Congress wanted to exclude exceedingly grave crimes from aggravated-felony coverage because it considered an interstate-commerce showing to have some bearing on culpability.

c. In a similar vein, petitioner speculates (Br. 33-36) that Congress could have intended the "described in" language to exclude state and foreign convictions under statutes that are equivalent to the specified federal statutes except for the absence of an interstate-commerce element because Congress regarded the fact that the particular offender was prosecuted by a state or foreign government as an indication that the conduct leading to conviction was likely to be less serious than the conduct leading to conviction for a substantively equivalent crime in federal court.

But when Congress wanted to capture only particularly serious forms of an offense in the aggravated-

felony provision, it did so explicitly—through formulations that are actually reasonably calculated to get at the most serious forms of the offenses at issue. See, *e.g.*, 8 U.S.C. 1101(a)(43)(D) (offenses "described in" the federal provisions banning money laundering, "if the amount of the funds exceeded $10,000"); 8 U.S.C. 1101(a)(43)(G) (theft and burglary offenses "for which the term of imprisonment [was] at least one year"); 8 U.S.C. 1101(a)(43)(M) (offenses involving fraud or deceit, "in which the loss to the victim or victims exceeds $10,000"); see also 8 U.S.C. 1101(a)(43)(N) and (P) (providing that certain document-fraud and alien-smuggling crimes are aggravated felonies except under certain circumstances when the crimes were committed to aid a family member).

In contrast, the assumption that Congress viewed crimes prosecuted by state authorities as characteristically less serious is contrary to basic principles of federalism. States are the sovereigns in the federal framework that are principally entrusted with the responsibility for punishing criminal activity—including the most serious crimes. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing the criminal law.") (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)); see also, *e.g.*, *Bond*, 134 S. Ct. at 2086-2087; *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2513 (2013). In keeping with that principle, even when federal jurisdiction exists, longstanding principles establish that it is generally appropriate for federal prosecutors to decline prosecution of any person who "is subject to effective prosecution in another jurisdiction." Offices of the U.S. Att'ys, *U.S. Attorneys' Manual: Principles of Federal Prosecution* § 9-27.240

(1997) (*U.S. Attorneys' Manual*), http://www.justice.gov/usam/united-states-attorneys-manual. Federal prosecutors are directed to make that determination based on considerations such as whether the state or local jurisdiction "has the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively," whether the crime was principally investigated by state or local authorities, whether a state or local jurisdiction has a particularly strong interest in the crime at hand, and what sentence is likely to be imposed in a state or local prosecution—rather than to take control of the most serious cases. *Ibid.*

Indeed, treating prosecution by state authorities as a proxy for less dangerous conduct would be particularly inappropriate in the context of arson and explosives crimes. When Congress first enacted what is now the arson and explosives statute—initially making it a crime to maliciously damage or destroy property only by means of explosives—Congress took the unusual step of expressly disclaiming any intent to displace state prosecutions, see 18 U.S.C. 848, through a provision long understood "as a statement of congressional intent that the Federal government—absent a specific Federal interest—will not become involved in bombing matters that can be adequately investigated and prosecuted by local authorities," *U.S. Attorneys' Manual* § 9-63.902; see Act of Oct. 15, 1970, Pub. L. No. 91-452, Tit. XI, § 1102, 84 Stat. 952. And when Congress subsequently amended Section 844(i) to reach malicious destruction of property through fire, members of Congress explained that this principle of restraint would remain in force. They noted that "[p]rimary responsibility" for investigating and prose-

cuting arson offenses "will remain with State and local law enforcement." 128 Cong. Rec. 18,814 (1982) (statement of Rep. Hughes); accord *id.* at 18,816 (statement of Rep. Moffett). While federal agents were expected to play a role in investigations "[b]ecause the investigation of arson crimes frequently requires expertise and technology which far surpasses the abilities of State and local governments to respond," *id.* at 18,815 (statement of Rep. McClory), the federal role was expected to principally involve providing support to States, see, *e.g.*, *id.* at 19,155 (statement of Rep. Heckler); *Anti-Arson Act of 1982: Hearing on H.R. 6377 and H.R. 6454 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 14 (1982) (statement of Robert Powis, Deputy Assistant Sec'y, Dep't of the Treasury). The federal government was expected to step in only where state and local authorities lacked "jurisdictional authority or sufficient investigative resources to deal actively with arson crimes." *Ibid.* Thus, prosecution by state authorities would be an unusually poor proxy for identifying less serious arson offenses.

Petitioner's hypothesis breaks down entirely in the context of the foreign crimes that Congress expressly provided could constitute aggravated felonies. Prosecution by a foreign sovereign, rather than the United States, would not be a reasonable proxy for identifying the least serious forms of arson, explosives crime, extortion, or similar offenses, because a foreign sovereign's having prosecuted the offense typically would simply reflect the fact that the criminal conduct took place abroad. Thus, as the Board appropriately recognized, petitioner's construction of "described in" makes scant sense in light of the effect that it would

have on foreign convictions. *Vasquez-Muniz*, 23 I. & N. Dec. at 211-212.

Further, the text of the aggravated-felony provision as a whole is not consistent with any coherent objective of excluding state or foreign offenses on offense-seriousness grounds. Congress made plain that it did *not* view state or foreign prosecution as a proxy for offense seriousness, as a general matter, when it clarified by amendment that the aggravated-felony provision should be construed to reach state and certain foreign offenses. 8 U.S.C. 1101(a)(43). And petitioner offers no plausible reason why Congress would have wanted to use state or foreign prosecution as a proxy for seriousness only for an assortment of crimes incorporated in the aggravated-felony provision through "described in" language—thereby excluding from coverage state convictions for exceptionally grave crimes involving child pornography, firearms, explosives and the like.

d. In the end, petitioner shrugs off the haphazard application of the aggravated-felony provision that would result from his view by asserting that many crimes would still furnish grounds for deportation under INA provisions other than those based on conviction of an aggravated felony. Pet. Br. 36-38 (describing provisions allowing Attorney General to initiate removal proceedings on specified other grounds). But that is no justification for a misreading of the aggravated-felony provision itself. Removal based on the non-aggravated-felony grounds to which petitioner points is subject to cancellation on a case-by-case basis, based on discretionary judgments by immigration authorities. See 8 U.S.C. 1229b(a) (giving Attorney General discretion to cancel the removal of an

inadmissible or deportable alien, subject to length-of-residency requirements, but only if the alien "has not been convicted of any aggravated felony"). The aggravated-felony provisions impose more categorical, firm, and expeditious removal standards and procedures, in light of Congress's determination that under the waivable removal grounds, "[t]he government's attempts to deport those aliens committing the most serious crimes ha[d] proved to be ineffective." 1995 House Report 6. Accordingly, petitioner errs in suggesting that Congress might have designed crazy-quilt aggravated-felony coverage simply because immigration authorities might have available alternative grounds that Congress determined to be inadequate when it enacted the aggravated-felony provisions.

5. Legislative history supports the conclusion that Congress intended the aggravated-felony provisions to reach state and foreign offenses without regard to any interstate-commerce jurisdictional element

The legislative history of the aggravated-felony provisions furnishes additional support for the conclusion that Congress sought to provide for swift removal of aliens convicted in any court of the serious substantive crimes covered by the aggravated-felony definition in Section 1101(a)(43), without regard to any interstate-commerce jurisdictional element.

First, in explaining the danger sought to be addressed by the aggravated-felony provisions, Members of Congress focused on the risks posed by criminal aliens in both the federal and state criminal justice systems. Members received testimony from state officials concerning the burden imposed by criminal aliens and cited statistics regarding alien incarceration in state prisons. See S. Rep. No. 48, 104th Cong.,

1st Sess. 1, 9 (1995); H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 146-147 (1990) (1990 House Report); *Criminal Aliens: Hearing on H.R. 3872 Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary* (*Criminal Aliens II*), 103d Cong., 2d Sess. 2 (1994) (statement of Rep. Mazzoli, Chairman); *Criminal Aliens I* 6 (statement of Rep. Smith); *Criminal Aliens II* 117-118 (statement of Rep. Schumer); 139 Cong. Rec. E705 (daily ed. Mar. 18, 1993) (statement of Rep. Moorhead); 139 Cong. Rec. 6324 (1993) (statement of Rep. McCollum). No Member appears to have suggested that the government's focus on removing aliens convicted of serious offenses should be on aliens convicted of federal crimes.

Second, Congress enacted the amendment specifying that the aggravated-felony definition encompasses offenses "whether in violation of Federal or State law," or "in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years," 8 U.S.C. 1101(a)(43), in order to ratify the treatment of state convictions set out in *In re Barrett*, 20 I. & N. Dec. 171 (B.I.A. 1990). 1990 House Report 147 (explaining that the amendment reflected "concur[rence] with the recent decision" in *Barrett*). *Barrett*, in turn, expressed an expansive understanding of the aggravated-felony definition's reach.

The Board held in *Barrett* that an alien's state drug-trafficking conviction qualified as an aggravated felony under an early version of the definition that reached only murder, drug-trafficking, and trafficking in firearms or explosives. 20 I. & N. Dec. at 175. In doing so, the Board explained that it understood the

aggravated-felony provisions as directed at particular criminal problems—there, the problem of the drug trade—and found it implausible that in seeking to address such problems, Congress intended to differentiate between convicted aliens "on the basis of whether the conviction was accomplished under state or federal law." *Ibid.* The Board further explained that construction of that aggravated-felony provision should take into account surrounding INA provisions, which generally placed state and federal offenses on equal footing. *Id.* at 175-176. The Board then described the appropriate test for determining whether a state conviction was for a drug-trafficking crime under the INA's aggravated-felony provisions as whether the conviction was under a statute "sufficiently analogous" to the relevant federal drug statutes, *id.* at 175, rather than demanding a precise match. Congress's amendment of the INA to "concur[] with," 1990 House Report 147, or "codify[]" *Barrett's* approach of "[e]xtend[ing] the definition of aggravated felony to include aliens convicted of *like* State crimes," 136 Cong. Rec. 35,621 (1990) (statement of Sen. Graham, lead sponsor) (emphasis added), provides additional support for the conclusion that the INA's aggravated-felony provisions are aimed at ensuring removal of aliens convicted of the most serious crimes in any jurisdiction, without regard to jurisdictional elements.

Finally, the passages in which Members of Congress discussed the INA provisions referring to crimes "described in" federal criminal statutes provide additional support for the prevailing understanding of that aggravated-felony language. Members of Congress routinely described those provisions as

extending aggravated-felony treatment to particular substantive criminal activity (like "child pornography"), without any suggestion that those substantive offenses would be covered only if they were in violation of federal law. See, *e.g.*, *Criminal Aliens II* 112 (statement of Rep. Smith), 132 (statement of Rep. Hunter), 134 (statement of Rep. Lehman); 139 Cong. Rec. at 6324 (statement of Rep. McCollum).

B. Any Ambiguity Should Be Resolved By Deferring To The Board's Reasonable Interpretation

As explained above, the text, structure, and history of the INA's aggravated-felony provisions establish that an alien is removable for a crime "described in" the federal arson and explosives statute when convicted of violating a state statute that is equivalent to the federal provision except for the absence of an interstate-commerce element. To the extent that any ambiguity remains, however, deference to the Board's construction of the INA's aggravated-felony provisions is warranted, because the deference principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), are applicable, and the Board's construction of that text in the INA is reasonable.

1. Principles of Chevron *deference apply*

a. "Principles of *Chevron* deference apply when the BIA interprets the immigration laws." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion) (citing *Chevron*, 467 U.S. at 842-844); *id.* at 2214-2216 (Roberts, C.J., concurring in the judgment); see *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009); *Immigration & Naturalization Serv.* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). Those holdings by this Court reflect the INA's express direction

that "[t]he Attorney General shall be charged with the administration and enforcement" of the INA with respect to the adjudication of removal proceedings[5] and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." *Aguirre-Aguirre*, 526 U.S. at 424 (quoting 8 U.S.C. 1103(a)(1)). Because the Attorney General has vested her adjudicative and interpretive authority in the Board (while retaining ultimate authority), "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *Id.* at 425 (citation and internal quotation marks omitted). Accordingly—as courts of appeals have uniformly held—the Board is entitled to deference when it interprets the meaning of the term "aggravated felony" in the INA. See *Soto-Hernandez* v. *Holder*, 729 F.3d 1, 4 (1st Cir. 2013); *Mugalli* v. *Ashcroft*, 258 F.3d 52, 56 (2d Cir. 2001); *Restrepo* v. *Att'y Gen. of the U.S.*, 617 F.3d 787, 795-796 (3d Cir. 2010); *Espinal-Andrades*, 777 F.3d at 169 (4th Cir.); *Alwan* v. *Ashcroft*, 388 F.3d 507, 513-515 (5th Cir. 2004); *Velasco-Giron* v. *Holder*, 773 F.3d 774, 776 (7th Cir. 2014), cert. denied, 135 S. Ct. 2072 (2015); *Spacek* v. *Holder*, 688 F.3d 536, 538 (8th Cir. 2012); *Renteria-Morales* v. *Mukasey*, 551 F.3d 1076, 1081 (9th Cir.

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[5] Other functions relating to immigration and naturalization that were formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of the Department of Homeland Security. Accordingly, some residual statutory references to the Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 542 note, 557; 8 U.S.C. 1551 note.

2008); *Balogun* v. *U.S. Att'y Gen.*, 425 F.3d 1356, 1361 (11th Cir. 2005), cert. denied, 547 U.S. 1113 (2006).

b. i. Neither of petitioner's arguments against *Chevron*'s applicability has merit. Petitioner argues (Br. 41-42) that principles of *Chevron* deference do not apply because the INA attaches consequences to certain immigration misconduct under several of the INA's criminal provisions when the misconduct is committed by (or with respect to) aliens previously convicted of aggravated felonies. Petitioner identifies three such crimes (Br. 39). First, 8 U.S.C. 1327 prohibits knowingly assisting in the reentry of an alien who is inadmissible under most of the security-related inadmissibility grounds in the INA, see 8 U.S.C. 1182(a)(3), or who has been convicted of an aggravated felony and is inadmissible under any of the "[c]riminal [or] related grounds" in 8 U.S.C. 1182(a)(2). Second, 8 U.S.C. 1253(a)(1) imposes criminal penalties on many classes of aliens who are subject to final orders of removal but willfully fail or refuse either to depart the country, to present themselves for removal, or to timely acquire necessary travel documents for removal, as well as aliens in those classes who conspire to thwart removal. That crime carries a higher statutory maximum sentence if an alien is subject to an outstanding order of removal based on many grounds in the INA's deportability section (8 U.S.C. 1227(a)): those that relate to "[s]muggling"; "[c]riminal offenses" (including but not limited to the aggravated-felony provisions); "[f]ailure to register and falsification of documents"; or "[s]ecurity." See 8 U.S.C. 1253(a)(1)(D). Finally, 8 U.S.C. 1326, which prohibits an alien from illegally reentering the country following deportation, imposes higher statutory maximum

penalties for, among others, aliens who illegally reenter the country after a deportation "subsequent to a conviction for commission of an aggravated felony," 8 U.S.C. 1326(b)(2), and aliens who illegally reenter following removal based on security and related grounds or pursuant to special terrorist removal procedures, see 8 U.S.C. 1326(b)(3).

This Court has never held that agencies are stripped of deference in construing terms in statutes they administer when those terms might also carry such criminal implications. To the contrary, it has deferred to agency interpretations of terms with such implications. *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703-704 (1995) (deferring to Secretary of the Interior's definition of the term "take," as used in the provision of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, that makes it unlawful to "take" endangered species); see *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335-1336 (2011) (giving deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), to agencies' consistent views in briefs and manuals concerning the anti-retaliation provision in the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, although "those who violate the antiretaliation provision * * * are subject to criminal sanction"); see also *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (deferring to regulation adopted by the Securities and Exchange Commission (SEC) in a criminal case, where the SEC's interpretation was set out in a legislative rule forbidding certain acts).

Petitioner contends (Br. 43) that *O'Hagan* presented distinct deference questions because it involved a statutory provision authorizing the SEC to adopt

regulations proscribing conduct. But that feature of *O'Hagan* simply called for application under *Chevron* of the more deferential arbitrary-and-capricious standard applicable to legislative rules. See 521 U.S. at 673 (quoting *Chevron*, 467 U.S. at 844). *O'Hagan* does not undermine the applicability of standard *Chevron* deference here, where the INA expressly authorizes the Attorney General to "administer and enforce" the INA in the adjudication of removal cases, and gives special force to her interpretations of the Act. 8 U.S.C. 1103(a)(1); see *Aguirre-Aguirre*, 526 U.S. at 424. That statutory framework calls for deference to the Attorney General's interpretations of the INA provisions she is charged with administering.[6]

Moreover, petitioner provides no reasonable basis for distinguishing *Sweet Home* or *Kasten*. He acknowledges (Br. 43) that the Court in *Sweet Home* "deferred to an Interior Department regulation" concerning the meaning of a term in the ESA that has criminal applications. But he suggests that the Court did so because "Congress explicitly made it a crime" not only to violate the ESA itself, but also "to violate [Interior Department] regulations." *Ibid.*; see 16 U.S.C. 1540(b)(1) (imposing criminal penalties on "[a]ny person who knowingly violates * * * any regulation issued in order to implement" particular provisions of the ESA). Petitioner identifies no portion of

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[6] In contrast, the Attorney General does not receive *Chevron* deference concerning provisions in the federal criminal code, with applications outside of the immigration context, simply because those provisions are cross-referenced in INA provisions. See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) (interpreting "crime of violence" in Title 18 of the United States Code without applying deference principles, in an immigration case).

Sweet Home establishing such a precondition for deference, however—and no portion does so. Instead, the Court held that deference was due to the Secretary's interpretation of the *statutory* term "take" under *Chevron* because the Secretary had taken a reasonable view of that ambiguous term, and "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation." *Sweet Home*, 515 U.S. at 703. Petitioner similarly cannot account for *Kasten*, which gave weight to agencies' views in construing a provision with criminal applications, as a result of those agencies' civil enforcement powers. 131 S. Ct. at 1335 (citing 29 U.S.C. 216(c) and 5 U.S.C. App. § 1, at 664) (2006)). The Attorney General, and the Board on her behalf, are similarly entitled to deference as they "administ[er] and enforce[]" the admissibility and removal provisions central to their responsibilities, see 8 U.S.C. 1103(a)(1), even if the INA's removal and inadmissibility categories might in some particular cases have some relevance to the INA's criminal penalties for immigration misconduct.

ii. In the alternative, petitioner argues that *Chevron* deference is inapplicable to the INA provision here because if there is any statutory ambiguity, he should prevail under either the rule of lenity applicable to criminal provisions (Br. 39-41), or the proposition that any "lingering ambiguities in deportation statutes" should be construed in favor of the alien (Br. 44) (quoting *Immigration & Naturalization Serv.* v. *St. Cyr*, 533 U.S. 289, 320 (2001)). Petitioner is again incorrect, because those are interpretive rules of last

resort, applicable only if there remains—as the Court has put it with respect to the rule of lenity—"a grievous ambiguity or uncertainty in the language and structure of the Act, * * * such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463-464 (1991) (citations, internal quotation marks, and brackets omitted); accord *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013); see *St. Cyr*, 533 U.S. at 320 (proposition that deportation statutes be construed in alien's favor applies only in the event of "lingering ambiguities"). Because an agency's reasonable construction of a statute is a tool from which aid can be derived in determining the statute's meaning, those canons of last resort cannot override the Board's ability to adopt, under *Chevron*, a "reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best." *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012).

This Court's decisions demonstrate that the canons petitioner invokes do not usurp the Attorney General's authority to resolve statutory ambiguities. As noted above, *Aguirre-Aguirre* applied *Chevron* deference to the interpretation of the INA's withholding-of-removal provisions, which obviously determine whether an alien will be deported. See 524 U.S. at 424; accord *Martinez Gutierrez*, 132 S. Ct. at 2017 (finding Board's construction of provision concerning relief from deportation was permissible, even if statute was ambiguous); *Negusie*, 555 U.S. at 523-525 (after finding statutory ambiguity, remanding for Board to apply interpretive authority to persecutor bar on withhold-

ing of removal, in case where petitioner had urged that case be decided in his favor based on principle that deportation statutes should be construed in favor of alien); see Pet. Br. at 36, *Negusie* v. *Mukasey*, No. 07-499 (June 16, 2008). Those rulings are contrary to petitioner's position, under which the alien should have prevailed if there was any statutory ambiguity.

2. The Board's interpretation of the aggravated-felony provisions is reasonable

The Board's construction of Section 1101(a)(43) is reasonable under *Chevron*, because it reflects, at minimum, "a permissible construction of the statute." *Mayo Found. for Med. Educ & Research* v. *United States*, 562 U.S. 44, 54 (2011) (quoting *Chevron*, 467 U.S. at 843). As all courts but one have agreed, there is ample support for the Board's view, based on the text; the definition's penultimate sentence regarding state and foreign offenses; the provision regarding early removal of state aggravated-felon offenders, see note 4, *supra*; and the illogical scope of the statute on petitioner's view.

In *Vasquez-Muniz*, the Board emphasized several of these grounds as persuasive. First, the Board emphasized that the penultimate sentence of the aggravated-felony provision, which states that the term "aggravated felony" applies to offenses under state and foreign law, "clearly reflects a concern over substantive offenses rather than any concern about the jurisdiction in which they are prosecuted." 23 I. & N. Dec. at 211. Second, the Board emphasized that a contrary approach would mean "virtually no state crimes would ever be included in" 8 U.S.C. 1101(a)(43)(E), despite an early-removal provision that "clearly contemplates that subparagraph (E) of the aggravated

felony provision encompasses state crimes." 23 I. & N. Dec. at 212 (discussing 8 U.S.C. 1231(a)(4)(B)(ii), which provides for early removal of "an alien in the custody of a State (or a political subdivision of a State)" if, *inter alia*, the alien was not in state custody for a conviction under Section 1101(a)(43)(E), the aggravated-felony provision reaching crimes "described in" the federal arson and explosives statutes). Finally, the Board emphasized that a contrary approach would produce irrational outcomes, particularly by excluding "grave" foreign convictions based on an interstate-commerce element that simply lacked relevance overseas. *Id.* at 211-213.

Petitioner identifies no defects in those three grounds, and while he challenges particular statements in the Board's opinion, those objections misunderstand the Board's reasoning. Petitioner first attacks the Board for having stated that under petitioner's approach, "virtually no state crimes would ever be included in section [1101](a)(43)(E)"—the aggravated felony subsection for firearms and explosives crimes with relevance to early removal. *Vasquez-Muniz*, 23 I. & N. Dec. at 211. Petitioner omits the "section [1101](a)(43)(E)" language when he quotes the Board, and misunderstands this sentence as an assertion that there would be "virtually no" state crimes covered under *any* aggravated-felony provisions. He then asserts (Br. 48) that the Board failed to take into account "all the state offenses referred to by their generic names" as well as "all the state offenses incorporating terms 'defined in' federal statutes." But there are *no* generic offenses or "defined in" references contained in Section 1101(a)(43)(E), which includes only "described in" offenses. 8 U.S.C.

1101(a)(43)(E). And the Board's statement that there would be *virtually* no state crimes covered under Section 1101(a)(43)(E) on the view that petitioner advocates is consistent with the fact that the section would reach state and foreign convictions for a small number of nonviolent firearms and explosives crimes forbidden under federal provisions that contain no interstate-commerce element. See note 4, *supra*.

Petitioner similarly asserts that the Board erred in stating that a "reference to state convictions" for offenses listed under Section 1101(a)(43)(E), in the early-removal provision limited to aliens who were convicted of state crimes, "'would be superfluous' unless the interstate commerce element were ignored." Pet. Br. 48 (quoting 23 I. & N. Dec. at 212; discussing 8 U.S.C. 1231(a)(4)(B)(ii)). Petitioner suggests (*ibid.*) that this statement was in error because a small number of convictions would be covered—"convictions under several statutes that do not include interstate commerce elements." But the Board made clear that it understood that the number of state offenses that would be covered under petitioner's view was not zero—it was just exceedingly small. See *Vasquez-Muniz*, 23 I. & N. Dec. at 212 (stating that "*virtually* no state crimes" would be covered under Section 1101(a)(43)(E)) (emphasis added).

Third, without quotation, petitioner (Br. 48) asserts that the Board overstated the impact on foreign offenses of the statutory construction he urges by holding, in petitioner's description, that "the penultimate sentence's reference to foreign convictions would be a nullity unless the interstate commerce element is ignored." But the Board did not incorrectly conclude that petitioner's reading would exclude *all* foreign

convictions. Rather, it correctly reasoned that "[*a*] *number of* grave offenses" set out in the "described in" provisions "would be found to have no foreign counterpart," such as "smuggling aliens through Canada," "issuing ransom demands for hostages in Mexico, or stockpiling explosives materials in France." *Vasquez-Muniz*, 23 I. & N. Dec. at 213 (emphasis added). And the Board found it "unreasonable to assume that Congress intended to exclude" offenses such as those based on the absence of a jurisdictional element. *Ibid.* That reasoning does not reflect an erroneous view that no foreign offenses at all would be covered on petitioner's theory.

Petitioner fares no better in his assertion (Br. 49) that the Board is not due deference because it changed its views with insufficient explanation. See *Vasquez-Muniz*, 23 I. & N. Dec. at 208 (explaining that after the Ninth Circuit reached a ruling contrary to its own, the Board reversed course "upon a close examination of the statute"). The Board set out the reasons for its change, by issuing a published opinion explaining the features of the statute on which it was relying and the reasons why it found those features relevant. This Court has never required more. The interpretation in *Vasquez-Muniz* has been followed by the Board, and sustained by all but one court of appeals, ever since. It should be upheld by this Court as well.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101 provides, in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

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[5] So in original. Probably should be preceded by "is"

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assist-

ing, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[6]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a wit-

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[6] So in original. Probably should be followed by a semicolon.

ness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

* * * * *

2. 8 U.S.C. 1182 provides, in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe viola-

tions of religious freedom, as defined in section 6402 of title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the

Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi) (III), unless the

alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secre-

tary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

* * * * *

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of title 18, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) Association with terrorist organizations

Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, is inadmissible.

* * * * *

3. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

* * * * *

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits

under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

* * * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the

criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is de-

portable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than

support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted—

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18 (relating to fraud and misuse of visas, permits, and other entry documents),

is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adop-

ted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in—

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is deportable.

(B) Terrorist activities

Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Participated in the commission of severe violations of religious freedom

Any alien described in section 1182(a)(2)(G) of this title is deportable.

(F) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18, is deportable.

* * * * *

4. 8 U.S.C. 1229b provides, in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *

5. 8 U.S.C. 1231 provides, in pertinent part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal or aliens ordered removed

* * * * *

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent of-

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[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph (B),"

fense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

* * * * *

6. 8 U.S.C. 1253(a) provides, in pertinent part:

Penalties related to removal

(a) Penalty for failure to depart

(1) In general

Any alien against whom a final order of removal is outstanding by reason of being a member of

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[3] So in original. Probably should be followed by a closing parenthesis.

any of the classes described in section 1227(a) of this title, who—

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order,

shall be fined under title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

(2) Exception

It is not a violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.

* * * * *

7. 8 U.S.C. 1326 provides, in pertinent part:

Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

* * * * *

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such

alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

* * * shall be fined under title 18, imprisoned for not more than 10 years, or both.

* * * * * *

8. 8 U.S.C. 1327 provides:

Aiding or assisting certain aliens to enter

Any person who knowingly aids or assists any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) or 1182(a)(3) (other than subparagraph (E) thereof) of this title to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined under title 18, or imprisoned not more than 10 years, or both.

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[1] So in original. The period probably should be a semicolon.

9. 18 U.S.C. 81 provides:

Arson within special and maritime jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously sets fire to or burns any building, structure or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping, or attempts or conspires to do such an act, shall be imprisoned for not more than 25 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed, or both.

If the building be a dwelling or if the life of any person be placed in jeopardy, he shall be fined under this title or imprisoned for any term of years or for life, or both.

10. 18 U.S.C. 844 provides, in pertinent part:

Penalties

* * * * *

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties

as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive shall be imprisoned for not more than 10 years or fined under this title, or both.

(f)(1) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof, or any institution or organization receiving Federal financial assistance, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.

(2) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct, directly or proximately causes personal injury or creates a substantial risk of injury to any person, including any public

safety officer performing duties, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both.

(3) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct directly or proximately causes the death of any person, including any public safety officer performing duties, shall be subject to the death penalty, or imprisoned for not less than 20 years or for life, fined under this title, or both.

(g)(1) Except as provided in paragraph (2), whoever possesses an explosive in an airport that is subject to the regulatory authority of the Federal Aviation Administration, or in any building in whole or in part owned, possessed, or used by, or leased to, the United States or any department or agency thereof, except with the written consent of the agency, department, or other person responsible for the management of such building or airport, shall be imprisoned for not more than five years, or fined under this title, or both.

(2) The provisions of this subsection shall not be applicable to—

(A) the possession of ammunition (as that term is defined in regulations issued pursuant to this chapter) in an airport that is subject to the regulatory authority of the Federal Aviation Administration if such ammunition is either in checked baggage or in a closed container; or

(B) the possession of an explosive in an airport if the packaging and transportation of such explosive is exempt from, or subject to and in accordance with, regulations of the Pipeline and Hazardous Materials

Safety Administration for the handling of hazardous materials pursuant to chapter 51 of title 49.

(h) Whoever—

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including

any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

* * * * *

11. 18 U.S.C. 848 provides:

Effect on State law

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

12. New York Penal Law 110.00 provides:

Attempt to commit a crime

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

13. New York Penal Law 150.10 provides:

Arson in the third degree

1. A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that (a) no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle, or if other persons had such interests, all of them consented to the defendant's conduct, and (b) the defendant's sole intent was to destroy or damage the building or motor vehicle for a lawful and proper purpose, and (c) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building or motor vehicle.

Arson in the third degree is a class C felony.

No. 14-1096

In the Supreme Court of the United States

JORGE LUNA TORRES,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the Immigration and Nationality Act ("INA"), Congress classified some offenses as aggravated felonies by using their generic names. These include murder and rape, among others—but not arson. Congress classified other offenses as aggravated felonies by referring to crimes "described in" specified federal statutes. One such crime is the one "described in" 18 U.S.C. § 844(i), the federal arson statute. If Congress's choice is to be respected, "arson" in the generic sense is not an aggravated felony. The only arson that is an aggravated felony is the arson "described in" section 844(i), which prohibits the burning of property "used in interstate or foreign commerce," and which is a serious felony punishable by a five-year minimum prison sentence.

Congress's choice is readily understandable. Not all arsons are serious offenses. Some are, but, as the government does not dispute, others are low-level offenses punished by the states with little or no jail time. Many arsons are punished only as misdemeanors. Arson is quite different in this respect from offenses like murder and rape. Congress thus had no reason to classify all arsons as aggravated felonies.

The government strains to offer excuses for ignoring Congress's choice of words, but none can hold up to scrutiny. Under the plain meaning of the statute, generic arson is not an aggravated felony. And even if the statute were ambiguous, the BIA's view is not entitled to deference.

I. Congress chose not to classify generic arson as an aggravated felony.

The government proffers several arguments for treating generic arson as an aggravated felony despite Congress's choice to the contrary. But none of the government's arguments can overcome the text of the statute.

First, the government supposes that Congress legislated against a "legal backdrop," U.S. Br. 16, in which "jurisdictional elements are not substantive or material elements of an offense," *id.* at 17. But there is no such backdrop. The background rule is precisely the opposite: Where an offense includes a so-called "jurisdictional" element such as a nexus to interstate commerce, that element is treated just like any other. *Jones v. United States*, 529 U.S. 848, 859 (2000); *United States v. Bass*, 404 U.S. 336, 347 (1971). "Jurisdictional" is not a magic word commanding courts or agencies to depart from their usual interpretive practices. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Immigration officials have no license to decide which elements of criminal statutes are more important than others.

Congress legislated with knowledge of a second background rule as well—the categorical approach, which requires an element-by-element comparison between the offense of conviction and the deportation ground at issue. The categorical approach was well established when Congress enacted the INA's aggravated felony definition. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013) (noting the categorical approach's "long pedigree," dating at least to 1913).

Immigration officials employing the categorical approach have never been understood to possess the authority to ignore elements of offenses. *See Lopez v. Gonzalez*, 549 U.S. 47, 57 (2006) ("a state offense whose elements include the elements of a felony punishable under [the specified federal statute] is an aggravated felony").

The penultimate sentence of the aggravated felony definition—"The term applies to an offense described in this paragraph whether in violation of Federal or State law"—cannot sensibly be read to direct immigration officials to ignore elements of offenses. The penultimate sentence was added for a different reason, to codify the outcome of *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990), in which the BIA determined that the defined generic term "drug trafficking crime" includes state crimes as well as federal crimes. *Lopez*, 549 U.S. at 57 n.8. The penultimate sentence's inclusion of *offenses*, rather than *conduct*, in violation of state or federal law indicates that Congress intended no departure from the categorical approach.

The government's invented "backdrop" would cause the INA's aggravated felony definition to sweep in huge categories of offenses Congress cannot conceivably have intended to include. For example, subsection E of the aggravated felony definition makes "an offense described in" 18 U.S.C. § 844(f) an aggravated felony. Section 844(f) prohibits the destruction of property "owned or possessed by ... the United States." On the government's view, with this "jurisdictional" element disregarded, every act of

vandalism, of property owned by anyone, everywhere, under all circumstances, would be an aggravated felony. Subsection H of the aggravated felony definition makes "an offense described in" 18 U.S.C. § 876 an aggravated felony. Section 876 forbids the sending of threatening communications "by the Postal Service." On the government's view, with this "jurisdictional" element ignored, all threats sent by any medium would be aggravated felonies.

The government's ostensible examples of its "backdrop" are nothing of the kind. The federal three-strikes statute (U.S. Br. 18-19) is worded very differently from the INA's aggravated felony definition. All the offenses in the three-strikes statute are referred to by their generic names. 18 U.S.C. § 3559(c)(2)(F)(i). While some of the listed generic offenses include a parenthetical illustrative reference to criminal conduct "*as* described in" a U.S. Code section falling within the generic category, *id.* (emphasis added), the focus of the three-strikes statute remains on the generic offenses listed. These generic offenses have no interstate commerce elements, so the question in our case cannot arise under the three-strikes statute. The question in our case concerns the specific federal offenses referenced in the INA's aggravated felony definition. This is a question on which cases interpreting the three-strikes statute can offer no guidance, because the three-strikes statute includes no such offenses.

Moreover, the three-strikes statute includes a broad prefatory clause specifying that it includes offenses "by whatever designation and wherever com-

mitted," a clause that is more inclusive than the penultimate sentence of the INA's aggravated felony definition, which lacks the "by whatever designation" language. *Id.* This clause has been interpreted by the lower courts as a specific directive from Congress to ignore "jurisdictional" elements when considering state offenses. *United States v. Wicks*, 132 F.3d 383, 386-87 (7th Cir. 1997); *United States v. Rosario-Delgado*, 198 F.3d 1354, 1357 (11th Cir. 1999). The lower court cases interpreting the three-strikes statute thus do not form a "backdrop" influencing the interpretation of the INA's aggravated felony definition, because the two statutes use different language to serve different purposes.

The three-strikes statute does happen to be instructive, although not in the way the government intends. One of the offenses the statute mentions solely by its generic name is "arson." 18 U.S.C. § 3559(c)(2)(F)(i). The three-strikes statute is thus yet another example of a point we made in our opening brief (Pet. Br. 21-22): When Congress wants to refer generically to arson, it uses the word "arson." But Congress did not use the word "arson" in the INA's aggravated felony definition.

The other ostensible examples of the government's invented "backdrop" are equally inapposite. The Assimilative Crimes Act (U.S. Br. 19-20) is worded much more broadly than the INA's aggravated felony definition. Rather than referring to offenses "described in" a federal statute, the Assimilative Crimes Act refers to "any act or omission" punishable under state law. 18 U.S.C. § 13(a). This broader language,

focusing on the defendant's conduct rather than the elements of an offense, reflects the unique purpose of the Assimilative Crimes Act, that of "borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves." *Lewis v. United States*, 523 U.S. 155, 160 (1998). The Assimilative Crimes Act is not a "backdrop" for interpreting the INA's aggravated felony definition, which uses completely different wording to serve a completely different purpose.

Nor can a "backdrop" be woven from extradition treaties (U.S. Br. 20-21), which, by the government's own admission, often specifically state that "jurisdictional" elements are to be ignored. If these treaties show anything, it is that when Congress wants to exclude "jurisdictional" elements, it does so explicitly. *See, e.g.*, 18 U.S.C. §§ 3142(e)(2)(A), 3142(f)(1)(D) (both requiring pretrial detention of a person convicted of a state offense that would have been a federal offense "if a circumstance giving rise to Federal jurisdiction had existed"); 18 U.S.C. § 5032 (requiring a juvenile to be tried as an adult if he has been convicted of a state offense that would have been a federal offense "if a circumstance giving rise to Federal jurisdiction had existed"). But Congress did not do so in the INA's aggravated felony definition.

Nor, finally, can a "backdrop" be found in decisions interpreting the mens rea requirements of criminal statutes (U.S. Br. 21-22). The fact that Congress often chooses not to require a mens rea for the interstate commerce element of a crime tells us nothing about whether Congress chose to classify

generic arson as an aggravated felony in the INA. To answer the latter question, the appropriate place to look is the text of the INA, not a hodge-podge of lower court cases interpreting the mens rea requirements of various unrelated criminal statutes.

The government's "backdrop" rests on a remarkable assertion of executive branch authority, under which immigration officials would have discretion to read elements out of federal crimes. There is no such backdrop.

Second, the government mistakenly asserts (U.S. Br. 22-24) that "described in" is a looser term than "defined in." On the government's view, *describing* merely entails "conveying central features," *id.* at 17, so that an offense is "described in" a statute even if the offense includes some, but not all, of the elements found in the statute.

It is hard to imagine an argument more destabilizing to the practice of statutory interpretation, because the argument cannot be cabined to so-called "jurisdictional" elements of crimes. If "described in" merely requires rough approximation, any element could be ignored, so long as a judge finds that the element is not a "central feature" of the statute. Indeed, the government's view would license a judge to ignore *any* statutory language the judge happens to find non-central, whenever one statute refers to matter "described in" another. As we showed in our opening brief (Pet. Br. 17-18), there are thousands of instances in the U.S. Code in which Congress refers to something "described in" a statute. If "described in" actually means "sharing the central features of,"

statutory interpretation will be a far more freewheeling enterprise than it is today.

Even if the government's argument could somehow be limited to "jurisdictional" elements, it would raise more questions than it answers. For example, 18 U.S.C. § 844(f) prohibits damage to several types of property "owned or possessed by, or leased to, the United States" or any "organization receiving Federal financial assistance." The government does not say whether "an idea or impression of" (U.S. Br. 17) that offense without the "jurisdictional" element would extend to damage of all privately-owned property, or perhaps property owned by state or local governments, or maybe property owned by organizations. There is a good reason judges are not in the business of declaring their "ideas" or "impressions" of offenses.

The dictionary definitions cherry-picked by the government (U.S. Br. 17) do not even support its contention that "described in" means "sharing the central features of." None gives that definition for "described." None says that "described" is a looser term than "defined." One of the definitions quoted by the government—"trace or traverse the outline of"—is the specialized meaning of *describe* used in geometry, as in the use of a compass to describe a circle, a meaning that Congress is unlikely to have used in the geometry-free INA.

There is a much simpler explanation for Congress's use of "defined in" and "described in." Section 1101(a)(43) uses "defined in" five times. Each time, the thing being referred to is formally designated as

a definition. *See* subsection B (referring to 21 U.S.C. § 802, titled "Definitions," and 18 U.S.C. § 924(c), providing that "the term 'drug trafficking crime' means any felony punishable under" specified statutes); subsection C (referring to 18 U.S.C. § 921, titled "Definitions," and 18 U.S.C. § 841, also titled "Definitions"); subsection F (referring to 18 U.S.C. § 16, titled "Crime of violence defined"). In the U.S. Code generally, when a statute refers to a Code section that is formally designated as a definition, it uses "defined in," pursuant to the drafting manuals used by both houses of Congress. Pet. Br. 19-20. By contrast, whenever section 1101(a)(43) uses "described in," the statute referred to is not formally designated as a definition, but is rather a statute setting forth the elements of an offense.

The government tries (U.S. Br. 23) to undermine this distinction by asserting that "ordinary federal criminal statutes are themselves definitions." But while this may be half-true in a metaphorical sense, it is not true at all in the literal sense. Section 1101(a)(43) uses "defined in" only to refer to Code sections formally designated as definitions. Otherwise it uses "described in."

To be sure, one can find other statutes that do not observe this distinction as rigorously as section 1101(a)(43) does (*see* U.S. Br. 24), but even these other statutes do not use "described in" any more loosely than "defined in." The government has defended its non-literal reading of the aggravated felony definition for years, in seven circuits and now in this Court, and the government still cannot cite a

single instance in which the U.S. Code uses "described in" to mean "sharing the central features of."

Third, the government insists (U.S. Br. 25-28) that Congress could not have used the word "arson" to refer to generic arson, because of ostensible ambiguities in the term. But Congress often uses "arson" to refer to generic arson. Pet. Br. 21-22. The three-strikes statute is one conspicuous example, as mentioned above. Another is the Armed Career Criminal Act, in which Congress likewise used the same generic term. 18 U.S.C. § 924(e)(2)(B)(ii). Congress took the opposite approach in the INA's aggravated felony definition, by excluding arson from the list of generic offenses and making express reference to a federal statute instead.

The government similarly contends (U.S. Br. 26) that the word "arson" would not have covered the other explosives offenses listed in subsection E(i). But if Congress had wished to include generic arson along with these explosives offenses, subsection E(i) would have provided that aggravated felonies include "arson" as well as the explosives offenses "described in" 18 U.S.C. § 844, just as subsection K provides that aggravated felonies include managing a "prostitution business" as well as the prostitution-related offenses "described in" several specified statutes.

Fourth, the government notes (U.S. Br. 29-31) that in 2003 Congress added another "described in" provision to the list of aggravated felonies. But the government errs in inferring that by doing so, Congress expressed a view on the issue in this case. In

2003, the issue had been addressed by only one court, the Ninth Circuit. *See United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001). A single court decision, from only one of the twelve circuits, hardly amounts to the "uniform interpretation by inferior courts" needed to infer Congress's approval. *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (citation and internal quotation marks omitted).[1]

More relevant than the 2003 amendment, which added only a single subparagraph, is the 1994 amendment, which added several provisions to the aggravated felony definition, including subsection E. Pub. L. No. 103-416, § 222, 108 Stat. 4320-22. At that time, Congress selected high sentence and monetary thresholds for many subsections, including a five-year prison requirement for theft or burglary (in subsection G), and Congress left intact the same five-year threshold for a crime of violence (in subsection F), making it all the more incongruous to read

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[1] Similarly unavailing is the government's attempt (U.S. Br. 43-44) to infer Congress's intent from the legislative history of the penultimate sentence of section 1101(a)(43). The penultimate sentence was meant to codify the outcome of *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990), in which the BIA determined that the defined term "drug trafficking crime" includes state offenses. *Lopez*, 549 U.S. at 57 n.8. The issue in our case did not arise in *Barrett*, which was decided when section 1101(a)(43) was much shorter and consisted entirely of offenses referred to by their generic names, some with reference to terms "defined in" federal statutes, such as "drug trafficking crime."

subsection E as encompassing convictions for misdemeanors or other crimes with minimal sentences.

Fifth, the government contends (U.S. Br. 31-42) that a literal reading of the INA's aggravated felony definition yields "haphazard coverage," *id.* at 37, in that some offenses classified as aggravated felonies are, in the government's view, "less grave by any measure," *id.* at 33, than other offenses not so classified. But this is an argument properly directed at Congress, not at a court. In a court, the question is not whether Congress chose wisely in declining to classify generic arson as an aggravated felony. The question is whether the statutory text embodying that choice is so absurd—whether the absurdity is "so gross as to shock the general or moral sense," *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)—that the text should not be read literally. Pet. Br. 32-33.

In any event, there was nothing haphazard about Congress's decision. Some arsons are not even felonies, much less serious felonies. At least eighteen states punish minor arsons as misdemeanors. NIJC/AILA Br. 8-10. Congress could not have wanted to classify all arsons, including all these misdemeanors, as aggravated felonies. It was thus not absurd for Congress to classify only federal arson as an aggravated felony, because federal arsons, which carry a minimum five-year sentence, tend to be much more serious than state arsons, some of which are punished with minimal fines or jail time, NACDL Br. 26-31, like the one-day sentence in this case.

The government professes (U.S. Br. 31-33) to fear that a literal reading of the aggravated felony definition will prevent the government from removing aliens who have been convicted of serious state or foreign offenses, but this fear is greatly exaggerated. Most serious state or foreign offenses are aggravated felonies under one or more of the 21 subsections of the INA's aggravated felony definition, or would trigger removal under one of the myriad other grounds for removal contained in the INA.

To use the government's own examples (*id.* at 33), an alien convicted in a state or foreign court of selling a child for the purpose of child pornography would likely be deemed by the government to have been convicted of an aggravated felony under subsection A of the aggravated felony definition (for sexual abuse of a minor), and would also likely be deemed removable under 8 U.S.C. § 1227(a)(2)(E) (for a crime against children), § 1227(a)(2)(F) (for trafficking), or § 1227(a)(2)(A)(i) (for a crime of moral turpitude if committed within five years of admission). An alien convicted in a state or foreign court of receiving explosives for the purpose of killing another would likely be deemed to have been convicted of an aggravated felony under subsection F of the aggravated felony definition (for a crime of violence), and would also likely be deemed removable under 8 U.S.C. § 1227(a)(2)(C) (for a firearm or destructive device offense) or § 1227(a)(2)(A)(i) (for a crime of moral turpitude if committed within five years of admission). An alien convicted in a state or foreign court of demanding a ransom for a kidnapping would likely be deemed to have been convicted of an aggravated

felony under subsection F of the aggravated felony definition (for a crime of violence), and would also likely be deemed removable under 8 U.S.C. § 1227(a)(2)(A)(i) (for a crime of moral turpitude if committed within five years of admission). And an alien convicted in a state or foreign court of possessing a firearm following a felony conviction would likely be deemed removable under 8 U.S.C. § 1227(a)(2)(C) (for a firearm offense).

Any serious state or foreign arson offense would also likely be deemed an aggravated felony under subsection F (for a crime of violence). *See In re Palacios-Pinera*, 22 I. & N. Dec. 434, 437 (BIA 1998). An alien convicted of arson in a state or foreign court would also likely be deemed removable under 8 U.S.C. § 1227(a)(2)(A)(i) (for a crime of moral turpitude). *See Vuksanovic v. Attorney General*, 439 F.3d 1308, 1311 (11th Cir. 2006).

Moreover, "[e]scaping aggravated felony treatment does not mean escaping deportation.... It means only avoiding mandatory removal." *Moncrieffe*, 133 S. Ct. at 1692. Where a serious state or foreign offense does not fall within the aggravated felony definition but fits within another removal ground, the government would still retain discretion to deny relief from removal if the offense is deemed serious enough.

The purpose of the INA is thus served just as well by reading the aggravated felony definition literally as that purpose would be served by accepting the government's invitation to distort the statutory text in order to define lower-level offenses, including

misdemeanors, as aggravated felonies. Under a literal reading, the government has ample authority to remove aliens who have been convicted of serious offenses.

In the end, the government's argument on this score boils down to the proposition that Congress chose "an unusually poor proxy for identifying less serious arson offenses." U.S. Br. 40. On the government's view, however, *all* arsons, no matter how trivial, would be classified as aggravated felonies, even arsons punished by the states as misdemeanors. That would be an even worse proxy for identifying the seriousness of arson offenses.

Sixth, the government's invocation of legislative history (U.S. Br. 42-45) does not, and indeed could not, contradict the text of the aggravated felony definition, which plainly makes federal arson, but not generic arson, an aggravated felony. In any event, the question before the Court is not whether members of Congress actually concluded that the inclusion of only federal arsons was a good way to avoid sweeping minor state arsons into the definition of aggravated felony. The question is whether this conclusion would have been so absurd that the statutory text should be disregarded. As we showed in our opening brief, Pet. Br. 32-38, it would not have been absurd at all.

This case is a perfect example. George Luna was convicted of attempted arson in the third degree, one of the less serious felonies in New York's penal code. He was sentenced to a single day in jail. If such a minor offense is an aggravated felony, barring the

discretionary relief of cancellation of removal, it is hard to imagine an offense that would not be. Meanwhile, Luna is exactly the kind of person for whom the discretionary relief of cancellation of removal was intended. He has spent almost his whole life in the United States. He is a gainfully employed homeowner who put his fiancée through graduate school. Sixteen years have passed since his sole brush with the law. The whole point of cancellation of removal is to vest the Attorney General with discretion to consider such circumstances before determining whether Luna will be removed. But if Luna's one-day jail sentence was for an aggravated felony, the Attorney General will not be able to exercise that discretion. This case shows the wisdom in Congress's decision not to classify generic arson as an aggravated felony.

II. The BIA's view is not entitled to deference.

The government advances (U.S. Br. 47-52) an extraordinarily aggressive view of *Chevron* deference, under which *Chevron* obliterates every other canon of statutory interpretation, including the two canons that govern this case, the rule of lenity for statutes with criminal applications and the principle of construing deportation statutes in favor of the alien. The government's view is contradicted by precedent and by common sense.

First, if the Court finds the aggravated felony definition ambiguous, the rule of lenity applies. As the government concedes (U.S. Br. 47-48), the aggravated felony definition has important criminal applica-

tions. Illegal reentry, 8 U.S.C. § 1326, is the second-most frequently prosecuted federal offense, amounting to more than a quarter of all federal sentencings. NACDL Br. 10. Nearly half of the defendants convicted of illegal reentry face maximum sentences of twenty years, rather than the lower statutory maximums of two or ten years, because they have been convicted of aggravated felonies. *Id.* The INA's aggravated felony definition is a true hybrid statute, with significant criminal and civil applications. If it is ambiguous, the rule of lenity is the proper interpretive guide.

Under the government's view of *Chevron*, it would be possible for a statute to have two inconsistent meanings, one in civil cases due to *Chevron*, and a different one in criminal cases due to the rule of lenity. But a statute is not "a chameleon, its meaning subject to change depending on" the type of case in which it appears. *Clark v. Martinez*, 543 U.S. 371, 382 (2005). It would make no sense to give "the same word, *in the same statutory provision*, different meanings *in different factual contexts*." *United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality opinion). For this reason, the Court has repeatedly stated that when a statute has both civil and criminal applications, like the INA's aggravated felony definition, the appropriate canon of construction is the rule of lenity, not *Chevron*. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992)

(plurality opinion); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011); *see* Pet. Br. 39-41.

This principle applies to all statutes with both civil and criminal applications, not, as the government contends (U.S. Br. 49 n.6), merely to statutes that appear in Title 18. *Thompson/Center*, 504 U.S. at 518 n.10 (rejecting the notion that "in order for the rule of lenity to apply, the statute must be contained in the Criminal Code"); *see, e.g.*, *id.* at 518 (applying the rule of lenity to a statute in Title 26); *Kasten*, 131 S. Ct. at 1336 (noting that the rule of lenity would apply to a statute in Title 29 if it were ambiguous). Statutes with both civil and criminal applications are governed by the rule of lenity to ensure that they are interpreted consistently in both contexts, not because of any formalistic concern about whether a statute has been placed in Title 18.

In prior cases involving the INA's aggravated felony definition, the Court has therefore either applied the rule of lenity or analyzed the statutory text without even discussing deference to the agency's position. *See Moncrieffe*, 133 S. Ct. at 1693 (applying rule of lenity); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010) (applying rule of lenity); *Nijhawan v. Holder*, 557 U.S. 29 (2009) (no reference to *Chevron* despite ruling in favor of government and despite government's request for *Chevron* deference, *see* U.S. Br. at 14-15, *Nijhawan v. Holder*, No. 08-495 (Mar. 25, 2009)); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (no reference to *Chevron* despite ruling in favor of government); *Lopez*, 549 U.S. 47

(2006) (no reference to *Chevron*); *Leocal*, 543 U.S. at 11 n.8 (applying rule of lenity).

The government ignores all these cases and relies instead (U.S. Br. 48) on a pair of cases in which the Court deferred to agency regulations with criminal applications, but the government's cases are easily distinguishable, because they involved statutes in which Congress explicitly delegated to the agency the power to issue regulations with criminal consequences. *See United States v. O'Hagan*, 521 U.S. 642, 673 (1997); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 704 n.18 (1995); *see* Pet. Br. 42-43.[2] Even if agencies are entitled to deference in that situation—a proposition that is by no means obvious, *see Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., respecting the denial of certiorari) (characterizing *Sweet Home Chapter* as a "drive-by ruling" that "deserves little weight"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734-35 (6th Cir. 2013) (Sutton, J., concurring) (interpreting *Sweet Home Chapter* narrowly so as not to defer to an agency's interpretation of a statute with criminal applications)—agencies receive no deference when they resolve ambiguities in statutes with criminal applications. Interpreting such statutes is a task for courts, not agencies. *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

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[2] The government includes *Kasten* in this list (U.S. Br. 48), but in *Kasten* the Court noted that the rule of lenity would have governed had the statute at issue been ambiguous, because it was "a statute with criminal sanctions [that was] applied in a noncriminal context." *Kasten*, 131 S. Ct. at 1336.

Even if we put the rule of lenity aside, there are several reasons—which the government fails to acknowledge—for rejecting *Chevron* deference when agencies interpret statutes with criminal applications. Deference would authorize the executive branch to define the very criminal conduct it prosecutes, in violation of the basic separation-of-powers principle that only the legislative branch may define crimes. Deference would turn agencies into policymakers in criminal matters, a field in which they have no expertise. Deference would allow the criminal law to change from one administration to the next without any action from Congress, a result irreconcilable with the axiom that the criminal law must "give ordinary people fair notice of the conduct it punishes." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). NACDL Br. 17-24.

Second, this case is also governed by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (citation and internal quotation marks omitted). The government's view of *Chevron* would abolish this principle, because in deportation cases the alien's adversary is always the agency that interprets the immigration statute. If ambiguities in deportation statutes were construed in the government's favor under *Chevron*, there would never be any opportunity for the presumption in favor of the alien to operate. But *Chevron* did not silently overrule the presumption, as is indicated by the several post-*Chevron* cases discussing it. *See Kawashima v. Holder*, 132 S. Ct. 1166, 1176 (2012); *St. Cyr*, 533 U.S. at

320; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

Indeed, as the government sees it (U.S. Br. 51), *all* principles of statutory construction are mere "canons of last resort" that courts may employ only after deferring to the agency's view of the statute. The government is mistaken. The standard canons of construction are applied at step one of *Chevron*, not at step two. Courts "only defer ... to agency interpretations of statutes that, applying the normal tools of statutory construction, are ambiguous." *St. Cyr*, 533 U.S. at 320 n.45 (citation and internal quotation marks omitted). Thus the Court has applied the presumption against preemption at step one to discern the meaning of a statute, rather than deferring at step two to the agency's view in favor of preemption. *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009). The Court has applied the presumption against implied rights of action at step one rather than deferring at step two to the agency's view in favor of an implied right of action. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). The Court has applied the presumption against reaching difficult constitutional questions at step one rather than deferring at step two to the agency's view that Congress legislated to the outer limit of its power. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The criminal rule of lenity and the presumption in deportation cases likewise apply at step one, before considering the agency's view, not at step two.[3]

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[3] Contrary to the government's assertion (U.S. Br. 51-52), the Court has never discussed the relationship between *Chevron*

If we step back a bit, the incongruity of the government's *Chevron*-beats-everything position becomes even more apparent. The rule of lenity is older than the United States, and "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). Some of the other canons of statutory interpretation have existed for nearly as long. The presumption in favor of the alien in deportation cases dates at least to the 1940s. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). These doctrines are much older than *Chevron*. The *Chevron* Court can scarcely have intended to make such dramatic changes to all these background norms of construction, without saying a word about it.

The BIA's view is in any event unreasonable, so it would be unworthy of deference even under *Chevron*. The BIA's second *Vasquez-Muniz* opinion rests entirely on the BIA's mistaken view that a literal reading of the statute would make nullities out of three provisions—the penultimate sentence's reference to state offenses, the penultimate sentence's reference to foreign offenses, and 8 U.S.C. § 1231(a)(4)(B)(ii)'s reference to state convictions. Pet. Br. 48-49. The government, quite rightly, advances none of these erroneous theories in this Court.

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and the presumption in favor of the alien in deportation cases. The alien did not raise the presumption in *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012), or *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). In *Negusie v. Holder*, 555 U.S. 511, 521 (2009), the Court declined to reach the question whether the BIA was entitled to deference, so there was no occasion to discuss whether deference comes before or after application of the presumption.

Yet the government defends (U.S. Br. 52-55) the BIA's opinion with arguments that are no better. The BIA's mistaken belief that the penultimate sentence "'reflects a concern over substantive offenses rather than any concern about the jurisdiction in which they are prosecuted,'" U.S. Br. 52 (quoting *In re Vaszquez-Muniz*, 23 I. & N. Dec. 207, 210 (BIA 2002)), ignores the distinction in the aggravated felony definition between offenses (like murder) named generically and offenses (like arson) covered only as "described in" specified federal statutes. The BIA's worry that a literal reading of the statute would mean that "'virtually no state crimes would ever be included in'" subsection E, U.S. Br. 52 (quoting *Vasquez-Muniz*, 23 I. & N. Dec. at 211), is beside the point, because the penultimate sentence does not say that every single subsection of the aggravated felony definition must include state crimes. Pet. Br. 29-30. The BIA's concern about excluding "'grave'" foreign offenses, U.S. Br. 53 (quoting *Vasquez-Muniz*, 23 I. & N. Dec. at 212), is groundless for the reasons we have already discussed. Virtually all serious state and foreign offenses not defined as aggravated felonies under subsection E are covered by other parts of the aggravated felony definition and also render aliens removable on several other grounds. The BIA got it right the first time, before it flip-flopped. *See In re Vasquez-Muniz*, 22 I. & N. Dec. 1415, 1422 (BIA 2000) ("Given ... the ordinary meaning of the phrase 'described in,' and the manner in which this phrase has customarily been used in federal laws and regulations, we cannot find adequate support for the Service's position that an element of the crime

'described in' [a specified federal statute] can simply be ignored").

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 14-1096

IN THE

Supreme Court of the United States

JORGE LUNA TORRES,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND IMMIGRANT DEFENSE PROJECT, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

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INTEREST OF *AMICI CURIAE*[*]

The Court's decision in this case not only raises an important question of immigration law but will also have significant criminal law consequences. *Amici*—national criminal defense organizations and organizations with expertise in the interrelationship between the nation's criminal and immigration laws—have a fundamental interest in the fair and just administration of the criminal justice system through clear laws that are properly applied in accordance with the dictates of the Constitution, the will of Congress, and the decisions of this Court. *Amici* offer this brief to help the Court understand the criminal law implications of the definition of "aggravated felony," the effect those implications have on the interpretation of federal immigration law, and the significant difference in level of seriousness between arson crimes prosecuted under federal law and the often lower-level offenses prosecuted under state law.

More detailed information about individual *amici* is provided in the Appendix.

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The statutory provision at issue in this case—the definition of "aggravated felony" in the Immigration and Nationality Act (the "INA"), 8 U.S.C. § 1101(a)(43) ("Section 1101(a)(43)")—has been before this Court many times. It creates severe criminal law consequences for many individuals, including non-citizens convicted of illegal reentry into the country after removal, the second-most prosecuted federal felony in the United States. As Petitioner has argued, the statute is clear on the point at issue here; a state offense is not "described in" the federal arson statute for purposes of § 1101(a)(43)(E) unless it shares each element of the federal offense. Pet. Br. at 14–29.

But should the Court find the statute ambiguous, it must clarify for the lower courts the role of an agency's interpretation in hybrid statutes—those that have *both* civil and criminal applications. In such cases, courts must apply the time-honored criminal rule of lenity to interpret any statutory ambiguity in favor of a criminal defendant or a civil petitioner, rather than grant *Chevron* deference to the agency's interpretation. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (under rule of lenity, courts must interpret "any statutory ambiguity" in a criminal statute in the accused's favor); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

This Court has routinely exercised plenary review over the proper construction of Section 1101(a)(43), a statute that identifies aggravated felonies by

specifying or cross-referencing (1) generic names of crimes, (2) crimes "defined in" certain criminal statutes, and (3) crimes "described in" other statutes. *See, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Kawashima v. Holder*, 132 S. Ct. 1166 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The court below, however, did not engage in *de novo* review. Instead, the Second Circuit gave broad deference to the Board of Immigration Appeals' ("BIA") insupportable interpretation of "described in" to encompass a state offense that does not share each element of the referenced federal offense. As a result, the Second Circuit accepted the BIA's decision to designate New York's arson law as an offense described in the federal arson statute, even though the former lacks the interstate-commerce element needed to convict a person of the latter. *Luna-Torres v. Holder*, 764 F.3d 152, 153 (2d Cir. 2014); *In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 213 (BIA 2002).

In reaching this result, the Second Circuit deferred to the BIA, reasoning that the aggravated-felony provision is "ambiguous" and that the BIA's construction is "permissible." *Torres*, 764 F.3d at 158 & n.4. In the course of granting agency deference, however, the Second Circuit did not even consider applying the criminal rule of lenity. *Id.* (instead addressing a so-called immigration rule of lenity, and only doing so after first deferring to the agency). Other circuits have similarly deferred to the BIA, either expressly or impliedly, without applying the criminal rule of lenity. *E.g.*, *Spacek v. Holder*, 688

F.3d 536, 538 (8th Cir. 2012) (according "substantial deference" to the BIA's statutory interpretation of "described in," and not addressing the criminal rule of lenity); *cf. Nieto Hernandez v. Holder*, 592 F.3d 681, 684–685 & n.5 (5th Cir. 2009) (withholding determination of "the precise degree of deference to be afforded the BIA's interpretation," but noting that the Circuit had "previously stated that it afford[s] considerable deference to the BIA's interpretation of the INA"; no mention of the criminal rule of lenity) (internal quotation marks omitted).

These courts misconceive the proper role of *Chevron* deference. A court should defer to the agency's interpretation only if ambiguity remains *after* deploying all relevant principles of statutory interpretation, including the rule of lenity. "All manner of presumptions, substantive canons and clear-statement rules take precedence over conflicting agency views." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) (citing numerous examples from this Court's rulings). Properly applied, the rule of lenity requires courts to construe Section 1101(a)(43)'s reach narrowly if ambiguity is present. The rule of lenity thus demands that the Court construe "described in" in Petitioner's favor, meaning that his New York conviction does not qualify as an "aggravated felony" because the state offense lacks an element essential to the definition of the federal offense. Lenity cures ambiguity. And it pretermits agency deference.

Even if the agency were accorded *Chevron* deference, though, the result would remain the same

because the BIA's interpretation of Section 1101(a)(43) is not reasonable. *Chevron* requires courts "to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) (overruled by statute on other grounds). But there is nothing reasonable about the BIA's interpretation of § 1101(a)(43). Apart from giving no consideration to the criminal rule of lenity, the agency ignored the ordinary meaning of "described in," *see* Pet. Br. at 14–20, and it ignored empirical evidence showing Congress's intent that the federal arson statute's interstate-commerce element serves a substantive function. Congress was clear in reserving the severe criminal and immigration law consequences of an aggravated felony determination for those convicted of the serious offenses described in and prosecuted under federal law, and in declining to attach the aggravated felony label to the often less serious offenses prosecuted under state laws that do not require prosecutorial proof of substantive elements such as the link to interstate commerce. The BIA's interpretation is the essence of "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. It is certainly not worthy of deference.

ARGUMENT

I. THE BIA'S INTERPRETATION OF "AGGRAVATED FELONY" DESERVES NO DEFERENCE

The court below erroneously deferred to the BIA's conclusion that a state offense is "described in" a specified federal criminal statute under Section 1101(a)(43)(E), even where the state offense does not contain all of the essential elements of the federal statute. *Luna-Torres*, 764 F.3d at 152, 158 (deferring to the BIA's "permissible construction" of the statute); *see also Spacek*, 688 F.3d at 538. *Cf. Espinal-Andrades*, 777 F.3d 163, 169 (4th Cir. 2015); *Nieto Hernandez*, 592 F.3d at 684–85.

Even assuming statutory ambiguity—a prerequisite to allowing an agency's interpretation to trump that of the courts—deference is not appropriate here. Section 1101(a)(43) has both civil and criminal applications. To the extent a statute with criminal and civil applications is ambiguous, those ambiguities must be resolved in favor of the defendant or petitioner under the canonical criminal rule of lenity. *Leocal v. Ashcroft*, 543 U.S. at 11 n.8 (2004). The rule of lenity affords constitutionally required fair notice to criminal defendants, promotes consistency in statutory interpretation across criminal and civil applications, and strikes "the proper balance between Congress, prosecutors, and courts" in defining, administering, and interpreting laws that have criminal applications. *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Moreover, this Court has repeatedly implored courts to deploy

all of the "normal 'tools of statutory construction'" before deferring to an agency's interpretation of an ambiguous statute. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron*, 467 U.S. at 843 n.9). The rule of lenity is one such tool. *Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (plurality opinion) ("The rule of lenity is a rule of statutory construction."). Thus, there is no irresolvable conflict between the rule of lenity and *Chevron*. They are applied sequentially—the criminal rule of lenity, as a tool of statutory construction, is deployed before deference is given. *See Chevron*, 467 U.S. at 843 n.9. Thus, "*Chevron* accommodates rather than trumps the lenity principle." *Carter*, 736 F.3d at 732 (Sutton, J., concurring).

Additionally, respect for the separation of powers, the absence of agency expertise, and the need for consistency over time in the interpretation of criminal statutes reinforce the conclusion that no deference is owed to the BIA's interpretation of Section 1101(a)(43). The BIA does not "administer" the statute in the criminal context—courts do. The BIA has no particular "expertise" interpreting or applying the statute in its criminal applications. And experience with this statute teaches that an agency interpretation can be anything but consistent; in fact, the BIA reached diametrically opposed conclusions within a mere 13 months on the same interpretative question presented to this Court. Deference is unwarranted.

A. Section 1101(a)(43) Has Extensive Criminal Applications, with Substantial Penal Consequences

The INA, like various other statutes, has both civil and criminal applications. *E.g.*, *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., respecting the denial of certiorari) (Section 10(b) of the Securities Exchange Act of 1934); *Maracich v. Spears*, 133 S. Ct. 2191, 2222 (2013) (Ginsburg, J., dissenting) (Driver's Privacy Protection Act); *Leocal*, 543 U.S. at 11 n.8 (Comprehensive Crime Control Act, as referenced in 8 U.S.C. § 1101(a)(43)); *Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion) (National Firearms Act). The INA criminalizes, among other things, (1) an immigrant's failure to leave the country after an order of removal, 8 U.S.C. § 1253; (2) the harboring of certain immigrants, *id.* § 1324; (3) an immigrant's improper entry, or reentry, into this country, *id.* §§ 1325, 1326; (4) providing assistance to immigrants who are improperly entering the country, *id.* § 1327; and (5) the importation of immigrants for immoral purposes, *id.* § 1328.

Section 1101(a)(43), the INA provision at issue here, itself has criminal applications. It defines "aggravated felony" not only for immigration proceedings, but also for purposes of defining crimes and setting forth criminal penalties. For example, it is illegal to aid or assist "any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an *aggravated felony*)." 8 U.S.C. § 1327 (emphasis added). Likewise, the federal failure-to-depart

statute makes it a crime for immigrants convicted of an "aggravated felony" to remain in the country. *See id.* § 1253(a).

Section 1101(a)(43) also substantially increases the sentencing exposure of those convicted of certain federal criminal offenses. For example, the maximum penalty authorized by statute for illegal reentry under 8 U.S.C. § 1326 is two years for a "simple" offense, meaning no enhancements based on predicate convictions, but 20 years if the defendant has been convicted of an aggravated felony. *See id.* § 1326(b)(2) (also identifying an intermediate penalty for those with prior non-aggravated-felony convictions). Likewise, a federal criminal defendant faces a maximum prison term of four years for "simple" failure to depart under 8 U.S.C. § 1253(a)(1), but he or she faces a maximum 10-year prison term if previously convicted of an aggravated felony. *See id.* § 1253(a)(1) (same). Along those same lines, helping an inadmissible immigrant who "has been convicted of an aggravated felony" enter the country is a federal crime punishable by a 10-year maximum prison sentence. *See id.* § 1327.

Severe consequences also result under the United States Sentencing Guidelines (the "Guidelines"). An immigrant convicted of improper entry under 8 U.S.C. § 1325(a) or illegal reentry under § 1326 incurs a substantially more severe sentencing range under the Guidelines if he or she has previously been convicted of an "aggravated felony," as defined by Section 1101(a)(43). *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.3 (2009). While illegal reentry itself carries a base offense level of 8,

id. § 2L1.2(a), that offense level increases to 12 if he or she was previously convicted of any felony, and it doubles to 16 if the defendant was previously convicted of an aggravated felony. *Id.* § 2L1.2(b)(1)(c)–(d); *see also Illegal Reentry Offenses*, UNITED STATES SENTENCING COMMISSION, 1, 7 (April 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

These criminal law consequences under Section 1101(a)(43) have widespread impact. The illegal reentry statute, which contains an "aggravated felony" enhancement, is the second-most prosecuted felony in our federal courts. Transactional Records Access Clearinghouse ("TRAC"), TRAC Reports, Prosecutions for 2014 (Dec. 5, 2014), *available at* http://tracfed.syr.edu/results/9x20548211252a.html. In 2013, illegal reentry cases accounted for 26 percent of all federal criminal sentencings and 83.3 percent of sentencings involving immigration offenses. *Illegal Reentry Offenses*, *supra*, at 9. And the raw number of illegal reentry cases has steadily climbed year after year, increasing nearly 10% in just four years—from 16,921 in 2009 to 18,498 in 2013. *Id.* What's more, of the 18,498 illegal reentry defendants sentenced in 2013, "slightly more than 40 percent faced a statutory maximum of 20 years under § 1326(b)(2)" because of an aggravated felony conviction. *Id.* (noting that approximately one quarter of illegal reentry defendants faced a two-year statutory maximum under § 1326(a) and about one-third faced a 10-year statutory maximum under § 1326(b)(1)).

Thus, there can be no doubt that an aggravated-felony conviction carries hefty criminal law consequences.

B. Because Section 1101(a)(43) Has Criminal Law Consequences, the Rule of Lenity Applies and the BIA Is Owed No Deference

Given that an "aggravated felony" conviction under Section 1101(a)(43) has both criminal and civil applications, that term must be interpreted consistently across both settings. *See Whitman*, 135 S. Ct. at 353. This remains true even when the case arises in a noncriminal context. *Leocal*, 543 U.S. at 11 n.8 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (applying rule of lenity to civil statute); *Thompson/Center Arms Co.*, 504 U.S. at 517–18 (plurality opinion) (same). Thus, to the extent there are ambiguities in Section 1101(a)(43), they are governed by the rule of lenity and "should be construed in the noncitizen's favor." *Carachuri-Rosendo*, 560 U.S. at 581.

The rule of lenity requires construing an ambiguous statute in favor of the defendant to determine the statute's meaning. And because courts must apply this and other traditional rules of statutory construction to resolve ambiguity *before* deferring to an agency's interpretation, there is no place for deference to the BIA. *See Chevron*, 467

U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.") (emphasis added).

1) The Rule of Lenity Requires "Aggravated Felony" To Be Construed Narrowly and in Favor of Petitioner

The rule of lenity is one of the "most venerable and venerated" principles of statutory interpretation. *Carter*, 736 F.3d at 731 (Sutton, J., concurring); *see also Thompson/Center Arms Co.*, 504 U.S. at 518 n.10 (plurality opinion); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 Harv. L. Rev. 26, 104 (1994) (lenity is a "substantive canon"). "The rule is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). It has been applied to all manner of statutes carrying criminal implications "for roughly two centuries." *See United States v. Ford*, 560 F.3d 420, 425 (6th Cir. 2009).

Lenity requires "ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). Under the rule, "when there are two rational readings of a criminal statute, one harsher than the other," courts may not choose the harsher reading unless "Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359–60 (1987) (superseded by statute on other

grounds); *see also Skilling v. United States*, 561 U.S. 358, 410–11 (2010) (applying the rule of lenity "absent Congress' clear instruction otherwise"); *Ladner v. United States*, 358 U.S. 169, 178 (1958) (rule of lenity applies to statutes that increase penalties).

To the extent that Section 1101(a)(43) is ambiguous, the rule of lenity requires the provision to be construed narrowly and in Petitioner's favor. *See, e.g.*, *United States v. Bass*, 404 U.S. 336, 347 (1971); *Whitman*, 135 S. Ct. at 353. Application of the rule to resolve ambiguity in Section 1101(a)(43) is not only required by this Court's precedent, but it also accords with three of the rule's purposes—"to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *Kozminski*, 487 U.S. at 952.

As for the first purpose, a narrow construction of Section 1101(a)(43) accords with the demand that the government provide fair notice of both the conduct it criminalizes, *see McBoyle v. United States*, 283 U.S. 25, 27 (1931), and the penalties it may impose for criminal offenses, *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). Section 1101(a)(43) does not give fair notice that a state offense can be an aggravated felony despite lacking an element of the federal criminal analogue. *See* Pet. Br. at 14–29. And "no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment

that is not clearly prescribed." *Santos*, 553 U.S. at 514.

The rule of lenity also fulfills the purpose of respecting our Constitution's separation of powers. This Court has held that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. And courts "presum[e] that Congress legislates with knowledge of our basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). Thus, by reading Section 1101(a)(43) to avoid harsh and unexpected criminal consequences that Congress did not clearly intend, this Court will leave the definition of criminal activity in the province of the legislature and respect legislative intent.

For these various reasons, it comes as no surprise that this Court frequently has interpreted Section 1101(a)(43) without deference to the BIA's interpretation and without any reference to *Chevron* at all. *See supra* at 3 (citing cases). The Government agreed in one of those cases that agencies do not have interpretive authority over statutes with criminal applications. Brief for Respondent, *Leocal v. Ashcroft*, No. 03-583, 2004 WL 1617398 (July 14, 2004), at *32–33.[1] No deference is warranted here

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[1] Here, as in those earlier cases, the definition of aggravated felony depends on the interplay between an INA provision and statutes that define federal crimes. In *Leocal*, for example, the Court held that a drunk-driving conviction was not an aggravated felony because it did not fit the definition of "crime

because the rule of lenity requires any ambiguity in Section 1101(a)(43) to be resolved in favor of Petitioner.

2) Even Under the *Chevron* Framework, the Rule of Lenity Precludes Agency Deference

Even if the *Chevron* framework applies to a statute with significant criminal law consequences, the BIA's interpretation of Section 1101(a)(43) would not be entitled to deference. Courts must apply statutory rules of construction *before* deeming a statute ambiguous and deferring to an agency's interpretation. *Cf. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (deferring to the agency because the lower court, in refusing to give deference, did not say that the statute was unambiguous and "invoked no other rule of construction (such as the rule of lenity) requiring it to conclude that the statute was unambiguous to

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of violence" used in Section 1101(a)(43)(F). *See Leocal*, 543 U.S. at 10, 13. That subsection incorporates the definition of "crime of violence" found in 18 U.S.C. § 16. As noted earlier, Section 1101(a)(43)(E) similarly extends the definition of aggravated felony to offenses described in a number of Title 18 provisions, including 18 U.S.C. § 844(i). The *Leocal* decision applied the rule of lenity even though the Court was dealing with a criminal statute in the deportation context, because Section 16 "has both criminal and noncriminal applications." *Id.* at 11 n.8. Thus, the decision whether the rule of lenity applies to the interpretation of a provision does not turn on where the provision is codified; rather, it turns on whether the interpretation will have both criminal and non-criminal consequences.

reach its judgment"). Put another way, deference "comes into play only if a statutory ambiguity lingers after deployment of all pertinent interpretive principles," *Carter*, 736 F.3d at 731 (Sutton, J., concurring), and the rule of lenity is an interpretive principle that resolves possible ambiguities. *See also id.* at 732 ("*Chevron* accommodates rather than trumps" interpretive principles, like the rule of lenity).

Accepting, as one must, that rules of statutory construction are applied before *Chevron* deference comes into play, the rule of lenity effectively forecloses agency deference when a statute has criminal applications. *Carter*, 736 F.3d at 732 (Sutton, J., concurring). As applied here, the rule of lenity cures Section 1101(a)(43) of any and all ambiguity—requiring "described in" to be construed to capture only those offenses with all of the same elements as the cross-referenced federal crimes, including the interstate-commerce element. With lenity properly applied, no "gap" remains for the BIA's interpretation to fill. *Cf. Chevron*, 467 U.S. at 843. To hold otherwise—to allow an agency to construe ambiguity in the government's favor—would extend the reach of a criminal statute further than any court could accomplish on its own. That would "turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *See Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J. concurring). Under these circumstances, there is no room for deference.

C. Respect for Separation of Powers, an Absence of Agency Expertise, and the Need for Consistency All Independently Militate Against Deference

Apart from the rule of lenity's primacy as an interpretative principle, three other separate and independent interests militate against deference to the BIA's interpretation of Section 1101(a)(43). Chief among them is respect for the separation of powers—a careful balance that the Founders struck between the three co-equal branches of government. That balance is upset when the same branch of government is allowed to decide what is a crime or its penalty and then choose when to prosecute under that interpretation. Relatedly, a key rationale for deference—agency expertise—is not present here. Courts, not agencies, have the expertise to interpret and apply criminal laws. Finally, criminal laws—even more so than civil laws—must be interpreted consistently over time to ensure the citizenry is given fair notice of the conduct that Congress has criminalized and the breadth of the applicable criminal penalties.

1) Deference Would Disrupt the Separation of Powers

As noted above, the rule of lenity prevents courts from exercising Congress's power to define criminal conduct. Judicial deference to an executive branch agency's interpretation of a criminal statute would upset the separation of powers in yet another way: by placing in one branch the power to define criminal

conduct and then prosecute those accused of engaging in it. Deference to an agency's interpretation of a statute with criminal applications is tantamount to allowing the agency to "define criminal activity," a power that rests exclusively with Congress. *See Bass*, 404 U.S. at 348. "[T]he most democratic and accountable branch of government"—the legislature—should define criminal conduct. *See Carter*, 736 F.3d at 731 (Sutton, J., concurring). Indeed, it is axiomatic that "'the King cannot create any offence by his prohibition or proclamation, which was not an offence before.'" *Whitman*, 135 S. Ct. at 353 (quoting *Case of Proclamations*, 12 Co. Rep. 74, 75 (K.B. 1611)).[2]

In short, deference would have the perverse effect of subtly shielding from independent judicial scrutiny the executive branch's interpretation of the very criminal laws that it sets out to prosecute. This Court "ha[s] never thought that the interpretation of those charged with prosecuting criminal statutes is

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[2] It may be the case that Congress is allowed to assign its authority to create or define a crime, but the prerequisites for delegation of that power are not present here. *See Carter*, 736 F.3d at 733 (Sutton, J., concurring). When Congress departs from traditional notions of separation of powers in that manner, it must do so "deliberately," "explicitly," and "distinctly." *Id.*; *see also Whitman*, 135 S. Ct. at 353 ("[I]t is quite a different matter for Congress to give"—"let alone for [courts] to *presume* that Congress gave"—an agency the "power to resolve ambiguities in criminal legislation") (emphasis in original). *Cf. Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2214 (2014) ("Courts defer to an agency's reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency"). Congress did not expressly delegate to the BIA the power to construe a criminal statute.

entitled to deference." *Crandon*, 494 U.S. at 177 (Scalia, J., concurring); *see also Whitman*, 135 S. Ct. at 353 ("[T]he Government's pretensions to deference collide with the norm that legislatures, not executive officers, define crimes"). By deferring to the BIA's interpretations, the lower courts have effectively allowed the BIA to enhance or decrease criminal penalties under the INA "at will," so long as it stays within the "ambiguities that the laws contain." *Whitman*, 135 S. Ct. at 353.

2) The BIA Lacks Criminal-Law Expertise

Chevron deference rests, in part, on respect for an agency's expertise in the subject matter of the statute that it administers. Considerations of agency expertise in this case, however, point the opposite way.

Chevron gives deference to an agency's interpretation of a "statute which it administers." *Chevron*, 467 U.S. at 842. But agencies do not "administer" criminal laws. Courts alone are charged with that responsibility. *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014) ("[C]riminal laws are for courts, not for the Government, to construe"). Indeed, this Court has "*never* held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) (emphasis added). The same is true of hybrid statutes with civil and criminal applications. *See, e.g.*, *Crandon*, 494 U.S. at 177 (Scalia, J., concurring) ("The law in question, a criminal statute, is not administered by any agency

but by the courts."). To be sure, the BIA administers the civil provisions of the INA, but it does not (and cannot) administer those laws in their criminal settings. *See, e.g.*, *id.* (Scalia, J., concurring) (that administrative necessity is "not the sort of specific responsibility for administering the law that triggers *Chevron*").

Chevron itself shows why courts should not defer to the BIA's interpretation of Section 1101(a)(43). This Court explained there that, in administering the Clean Air Act, the Environmental Protection Agency is charged with "implementing policy decisions in a technical and complex arena." 467 U.S. at 863. The Court specifically noted that the Clean Air Act's "regulatory scheme is technical and complex" and observed that "[p]erhaps" Congress left to the agency the ability to "strike the balance" between competing interests in this area because "those with great expertise and charged with responsibility for administering [the law] would be in a better position to do so." *Id.* at 865. This case is different because the BIA, like other agencies, simply lacks the relevant expertise. *See Crandon*, 494 U.S. at 177 (Scalia, J., concurring).

Several courts of appeals have recognized that "[t]he BIA has no special expertise by virtue of its statutory responsibilities in construing state or federal criminal statutes." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 907 (9th Cir.), *cert. denied*, 130 S. Ct. 1011 (2009); *see also, e.g.*, *Santana v. Holder*, 714 F.3d 140, 143 (2d Cir. 2013); *Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001). That is especially so for the provision at issue here. The phrase

"described in [a particular statutory provision]" is not an immigration term of art. Congress has used that phrasing repeatedly in a large number of statutes having nothing to do with immigration, including several criminal statutes. *See, e.g.*, 18 U.S.C. § 32(b)(4) (criminal penalties for persons who willfully attempt or conspire to commit "an offense described in paragraphs (1) through (3) of this subsection"); 18 U.S.C. § 38(b)(5)(A)–(B) (different fines depending on which paragraph the offense is "described in"); 18 U.S.C. § 209(f) (creating exemption from criminal liability for officers or employees injured "during the commission of an offense described in section 351 or 1751 if this title"); 18 U.S.C. § 485 (extending liability to anyone who "attempts the commission of any offense described in this paragraph"). Nothing about the interpretation of "offense described in" would be informed by an agency's expertise in immigration matters.

3) Deference Would Lead to Intolerable Inconsistencies Because Agencies Are Not Bound by *Stare Decisis*

One final reason for not deferring to the BIA's interpretation of Section 1101(a)(43)—separate and apart from lenity, separation of powers, and lack of agency expertise—is to ensure that the provision is interpreted consistently over time, especially in its criminal applications.

This Court requires consistent interpretation of statutory provisions that carry both criminal and non-criminal consequences; a statutory term does not

expand or contract based on the type of proceeding that the government chooses. *See, e.g.*, *Santos*, 553 U.S. at 522; *Leocal*, 543 U.S. at 11 n.8. In *Leocal*, for example, the Court recognized that the term "crime of violence," as used in Section 1101(a)(43), has been "incorporated into a variety of statutory provisions, both criminal and noncriminal" and held that it "must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal*, 543 U.S. at 4, 7, 11 n.8. To allow otherwise "'would render every statute a chameleon'" and allow judges or, worse, agencies to "'give the same statutory text different meanings in different cases.'" *Santos*, 553 U.S. at 522–23 (quoting *Clark v. Martinez*, 543 U.S. 371, 378 (2005)). But a "statute is not a chameleon. Its meaning does not change from case to case." *Carter*, 736 F.3d at 730 (Sutton, J., concurring). And allowing the "same words" in the same statute to mean different things depending on the type of proceeding "would be to invent a statute rather than interpret one." *Clark*, 543 U.S. at 378.

Equally important, unless a statute with criminal applications is interpreted consistently over time, the citizenry will be deprived of fair notice of which conduct is criminal and the penalty for engaging in it. *See McBoyle*, 283 U.S. at 27. Deference to an agency's interpretation of a criminal statute would leave the door open for the statute's meaning to change back and forth over time, at the whims of each newly installed administration and with no

requirement of advance notice.[3] Deference, in effect, would "allow one administration to criminalize conduct within the scope of the ambiguity, the next administration to decriminalize it, and the third to recriminalize it, all without any direction from Congress." *See Carter*, 736 F.3d at 729 (Sutton, J., concurring).

In fact, that is precisely what has happened with Section 1101(a)(43). In 2000, the BIA held that a state offense is not "described in" Section 1101(a)(43)(E) if the state offense lacks the interstate-commerce element of the referenced federal statute, because characterizing an element as "'jurisdictional' does not change the fact that it is an element of the offense." *In re Vasquez-Muniz*, 22 I. & N. Dec. 1415, 1420, 1424 (BIA 2000). A mere 13 months later, however, after a new administration took office, the BIA changed its mind, finding a state offense to be "described in" a federal statute even if the state offense lacks the "jurisdictional" interstate-commerce element. *See In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 213 (BIA 2002).

No one should be surprised by this bureaucratic flip-flop. Nor would it be unusual if future administrations continued to oscillate. Indeed, the

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[3] This Court deferred in *Chevron* despite the EPA's change in interpretations over time. *Chevron*, 467 U.S. at 863 ("The fact that the [EPA] has from time to time changed its interpretation of the term . does not lead us to conclude that no deference should be accorded the [EPA's] interpretation of the statute."). But unlike Section 1101(a)(43), the Clean Air Act provision at issue in *Chevron*, "stationary source," had no criminal applications. *See id* at 840.

one consistent thing about the BIA's interpretation of the INA is its disregard for consistency. *See, e.g.*, *Judulang v. Holder*, 132 S. Ct. 476, 488 (2011) (unanimously rejecting the BIA's interpretation while noting that the "BIA repeatedly vacillated" in determining whether § 212(c) of the INA permits the Attorney General to grant discretionary relief to a deportable non-citizen).

If past is prologue, deference to the BIA would undermine fair notice and consistency.[4] "Whether a person spends twenty years in prison cannot depend on the unpredictably changing views of agency officials." Pet. Br. at 41.

II. EVEN IF *CHEVRON* DEFERENCE APPLIED HERE, THE OUTCOME WOULD BE THE SAME

With the rule of lenity requiring ambiguities in Section 1101(a)(43) to be construed in Petitioner's favor, that—in *Chevron's* words—"is the end of the

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[4] The Court's decision in *Babbitt v. Sweet Home Chapter, Cmtys. for a Great Or.*, 515 U.S. 687 (1995), is of no moment. In *Babbitt*, the Court, with "scarcely any explanation . . brushed the rule of lenity aside in a footnote, stating that '[w]e have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations." *Whitman*, 135 S. Ct. at 353 (Scalia, J., respecting the denial of certiorari) (quoting *Babbitt*, 515 U.S. at 704, n.18)). But this comment in *Babbitt* "deserves little weight," as it both "vindicates the principle that only the legislature may define crimes and fix punishments" and "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." *Id.* at 353–54.

matter." *Chevron*, 467 U.S. at 842–43. But even if the Court were to apply *Chevron* deference by reviewing the BIA's interpretation for reasonableness, the result would be the same. The BIA failed to apply, or even mention, the interpretive principle most salient here—the rule of lenity. Moreover, empirical evidence, which shows that the interstate-commerce element is a valid proxy for more serious offenses, bears out the conclusion that Congress meant what it said when it enacted Section 1101(a)(43). Put simply, the BIA's interpretation is unreasonable and entitled to no deference—even under *Chevron*.

A. The Manner in Which the BIA Interpreted the Provision Was Unreasonable

Chevron requires courts to accept only those agency interpretations "that are reasonable in light of the principles of construction courts normally employ."[5] *Arabian Am. Oil Co.*, 499 U.S. at 260 (Scalia, J., concurring in part and concurring in the judgment). Courts properly refuse to defer to agency interpretations that are not reasonable. *See Francis*, 269 F.3d at 168 n.8 (noting that the BIA's decision would be reversed "even if *Chevron* applied because the BIA's analysis is not a reasonable interpretation

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[5] Thus, "[i]f you believe that *Chevron* has only one step, you would say that *Chevron* requires courts 'to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.'" *Carter*, 736 F.3d at 731 (Sutton, J., concurring) (citing *Arabian Am. Oil Co.*, 499 U.S. at 260) (Scalia J., concurring in part and concurring in judgment).

of 8 U.S.C. § 1101(a)(43)(F)"). After all, "deference is not abdication." *Arabian Am. Oil Co.*, 499 U.S. at 260.

The BIA's interpretation of Section 1101(a)(43) is unreasonable for the many reasons articulated by Petitioner. Pet. Br. at 47–49. It is also unreasonable because the BIA failed to apply—or even mention—the criminal rule of lenity. As explained above, the rule dictates that "[w]hen ambiguity clouds the meaning of a criminal statute, the tie must go to the defendant." *United States v. Ford*, 560 F.3d 420, 425 (6th Cir. 2009) (internal quotations omitted). "Rules of interpretation bind all interpreters, administrative agencies included." *Carter*, 736 F.3d at 731 (Sutton, J., concurring). "That means an agency, no less than a court, must interpret a doubtful criminal statute in favor of the defendant." *Id.* "[A] court should not defer to an agency's anti-defendant interpretation of a law backed by criminal penalties." *Id.* Although the BIA may have engaged in *some* statutory analysis (ultimately reaching the wrong conclusion), its failure to apply or even mention the criminal rule of lenity renders its interpretation of Section 1101(a)(43) unreasonable and worthy of no deference.

B. Empirical Evidence Confirms that Congress Intended the Interstate-Commerce Element To Function Substantively

The BIA's capacious construction of Section 1101(a)(43) does not comport with the words Congress used. Nor could other canons of

construction justify reading "offense described in" to mean "one element short of an offense described in." This is especially the case because experience shows that the element being excised, the interstate-commerce element, plays an important role in narrowing "aggravated felony" to more serious offenses. Thus, contrary to the BIA's declaration that "the omission of the Federal jurisdictional element" is "not dispositive," *Matter of Bautista*, 25 I. & N. Dec. 616, 620 (BIA 2011), *vacated by Bautista v. Attorney Gen.*, 744 F.3d 54 (3d Cir. 2014), Congress sensibly required a nexus to interstate commerce for the offenses at issue here.

Serious crimes of the types that might qualify as aggravated felonies are significantly more likely to be prosecuted federally. Susan R. Klein et al., *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006-2010*, 51 HOUS. L. REV. 1381, 1401 (2014). For example, although the federal and New York statutes at issue here contain similar elements (apart from the notable difference when it comes to interstate commerce), the more serious arson crimes are generally prosecuted by the federal government, with minor arson offenses left to the state courts. *Id.* at 1395. A comparison of filings between 2006 and 2010 reveals that where an arson crime contains indicia of seriousness, including, for example, the use of a weapon, the presence of a minor victim, or prior violent or drug-related arrests, the crime is considerably more likely to be prosecuted federally. *Id.* at 1426. In particular, where a weapon is used, an arson case is 369% more likely to be charged in federal court than in state court. *Id.* at 1416, Tbl. 27.

Where a minor victim is involved, an arson case is 711% more likely to be charged federally. *Id.* Where the suspect has between one and five prior violent arrests, an arson case is 433% more likely to be charged federally. *Id.* And where the suspect has between six and ten prior violent arrests, that number rises to 4,028%. *Id.*

Although there will, of course, be exceptions to this general rule, the question is not whether federal prosecutions *always* involve more culpable conduct than the offenses that give rise to prosecutions under similar state statutes. After all, Congress chose a categorical approach rather than looking to the manner in which each defendant committed each predicate offense. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1684; *cf. Johnson*, 135 S. Ct. at 2557 (Armed Career Criminal Act).

One explanation for this phenomenon when it comes to arson cases is that numerous state arson statutes are only misdemeanors.[6] *See, e.g.*, Code of Ala. § 13A-7-43(d) ("Arson in the third degree is a Class A misdemeanor"); Colo. Rev. Stat. § 18-4-103 (3) ("Second degree arson is a class 2 misdemeanor, if the damage is less than one hundred dollars."); Iowa Code § 712.4 ("Arson in the third degree is an aggravated misdemeanor."); Md. Criminal Law Code

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[6] Some offenses count as an aggravated felony only if they are punishable by a term of imprisonment of at least one year, *e.g.*, § 1101(a)(43)(F), two years, *see* § 1101(a)(43)(T), or five years, *see* § 1101(a)(43)(Q). But for offenses "described in" a specified federal statute, there is no language preventing offenses with low maximum penalties from being labeled aggravated felonies.

Ann. § 6-105(c) ("A person who violates this section is guilty of the misdemeanor of malicious burning in the second degree."); Mich. Comp. Laws § 750.77(3) ("Fifth degree arson is a misdemeanor."); R.S. Mo. § 569.053 (2) ("Arson in the third degree is a class A misdemeanor."); N.Y. Penal Law § 150.01 ("Arson in the fifth degree is a class A misdemeanor."); Wyo. Stat. § 6-3-104(b) ("Fourth-degree arson is a misdemeanor."); Or. Rev. Stat. § 164.335(2) ("Reckless burning is a Class A misdemeanor."); Tenn. Code Ann. § 39-14-304 ("Reckless burning is a Class A misdemeanor."); Utah Code Ann. § 76-6-104(2) (Reckless burning is a misdemeanor); Rev. Code Wash. (ARCW) § 9A.48.050(2) ("Reckless burning in the second degree is a gross misdemeanor."); Cal. Pen. Code § 452(d) ("Unlawfully causing a fire of property is a misdemeanor."); Haw. Rev. Stat. § 708-8254 ("Arson in the fourth degree is a misdemeanor.").

Federal arson prosecutions, which carry a statutory minimum of five years and a maximum of 20 years under 18 U.S.C. § 844(i), often involve death or a risk of substantial property damage and harm to others. *See, e.g.*, *Russell v. United States*, 471 U.S. 858, 859 n.1, 859–60 (1985) (affirming defendant's conviction and 10-year sentence under the § 844(i), where defendant hired a convicted felon to start a fire in the apartment building owned by defendant by using a natural gas line in the basement); *United States v. Aman*, 480 F. App'x 221, 222 (4th Cir. 2012) (affirming defendant's conviction for the burning of a restaurant, bar, and pool hall facility in a commercial office building that housed more than 70 other businesses using lighter fluid and gasoline under

§ 844(i)); *Belflower v. United States*, 129 F.3d 1459, 1460 (11th Cir. 1997) (affirming defendant's conviction and 121-month sentence for bombing a car owned by the Sheriff's department, in violation of § 844(i)); *United States v. Brown*, 74 F. Supp. 2d 637, 638, 644 (N.D.W. Va. 1998) (affirming magistrate judge's denial of motion to dismiss indictment for arson under § 844(i) where defendants' residence was destroyed by fire and five children who lived in the home died).

Consistent with this difference in offense severity, federal defendants also serve longer sentences than their state counterparts. Susan R. Klein et al., at 1388. Between 2006 and 2010, the mean sentence for arson charged in federal court was 84.2 months, while the mean sentence for arson charged in New York state court was only 41.1 months. *Id.* at 1425. And that understates the difference, because while a federal defendant actually serves the great bulk of the sentence imposed (with a small "good time" credit), a state criminal defendant serves a much smaller percentage of jail time before being released on parole. *Id.* Thus, while federal arson defendants served nearly all of their 84.2-month average sentences, state arson defendants actually served, on average, only 24.6 months. *Id.*

Congress therefore took a sensible approach in light of the severe criminal and immigration law consequences attached to conviction of an aggravated felony when it declined to create a "jurisdictional element" exception for offenses described in federal law, such as the federal arson statute at issue here,

that would encompass the lower-level offenses often prosecuted under state law.

CONCLUSION

For all of these reasons, the Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX – INTEREST OF AMICI

The National Immigration Project of the National Lawyers Guild ("NIP") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For 30 years, the NIP has provided legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises. The NIP has participated as *amicus curiae* in several significant immigration-related cases before this Court. *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010).

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has submitted *amicus curiae* briefs in many of this Court's key cases involving the interplay between criminal and immigration law. *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012);

Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (citing IDP brief).

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. NAFD has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals. NAFD has filed in this case to offer the knowledge and experience of the indigent defense bar regarding both the operation of the Rule of Lenity and the nature of arson offenses prosecuted in state and federal courts. In addition, NAFD understands that the resolution of this case will have broader implications for federal criminal defendants and supports Petitioner's arguments that the Court should hew to a strict categorical approach or apply the Rule of Lenity in construing the aggravated felony statute.

The National Association of Criminal Defense Lawyers ("NACDL") files numerous *amicus curiae* briefs each year in this Court and other courts. This Court has often cited NACDL *amicus curiae* briefs that address the everyday workings of the criminal justice system and the implications of the Court's decisions in criminal justice and immigration cases. *See, e.g.*, *Navarette v. California*, 134 S. Ct. 1683 (2014) (Scalia, J., dissenting); *Fernandez v. California*, 134 S. Ct. 1126 (2014) (Ginsburg, J., dissenting); *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (Sotomayor, J., concurring); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *INS v. St. Cyr*, 533 U.S. 289 (2001).

The National Association for Public Defense ("NAPD") is an association of nearly 8,000 attorneys and other professionals critical to delivering the constitutional right to effective assistance of counsel for individuals charged with criminal offenses in the United States. NAPD members are the advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. The NAPD has a deep interest in the correct interpretation of laws involving the potential direct and enmeshed consequences of criminal convictions.

No. 14-1096

In the Supreme Court of the United States

JORGE LUNA TORRES, PETITIONER,

v.

LORETTA E. LYNCH, ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

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INTRODUCTION AND INTERESTS OF *AMICI*

The National Immigrant Justice Center and the American Immigration Lawyers Association, as *amici curiae*,[1] respectfully submit this brief to alert the Court to the impact the Government's position would have on lawful permanent residents and individuals fleeing persecution. As a practical matter, the Government's reading of 8 U.S.C. § 1101(a)(43)(E) would expand the category of "aggravated felonies" to include a variety of minor state arson offenses, many of which are punished as misdemeanors. There is nothing in the text of the statute to suggest that Congress intended such a counterintuitive result.

Congress has long recognized that deportation may cause great hardship—leaving children without parents, depriving families of their livelihood, and even exposing the deported person to a risk of persecution and death upon return to his country of origin. In recognition of this risk of hardship—and in acknowledgement of our Nation's obligations under the 1967 Protocol Relating to the Status of Refugees—Congress has created several avenues for relief. These avenues are designed specifically to provide hope for people who would otherwise be subject to deportation—for example, people who have no prior right to be in the United States but have come here seeking safety from persecution, and longstanding lawful permanent residents who have run into trouble with the law. Congress thus

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[1] Counsel for all parties have consented to the filing of this brief, in letters that are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel has made a monetary contribution to the preparation or filing of this brief.

intended these avenues for relief to be open even if the individual has been convicted of a crime—unless the crime was an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43).

This case is the latest in a series of cases in which the Government has attempted to block access to these avenues for relief by adopting an overly expansive definition of "aggravated felony." The definition of "aggravated felony" includes some broad categories of crimes—like "murder" and "rape"—as well as certain "offense[s] described in" specific sections of the federal criminal code. The question before the Court is whether a state offense counts as "an offense described in" a federal criminal statute when it lacks a critical element of that federal offense: the element relating to interstate commerce. As a matter of statutory interpretation, the answer is no. The state arson conviction in this case was not for the "offense described in" the federal arson statute because it was missing an essential element—proof that the burned property was connected to "interstate commerce." 18 U.S.C. § 844(i).

The Government's contrary position would have the bizarre effect of treating a variety of minor state offenses (including misdemeanors) as "aggravated felonies" that block an immigrant's access to relief. As discussed below, many state arson statutes address relatively minor offenses that involve only tiny amounts of damage, cause no injury to anyone, and are punished with only nominal jail time or fines. For example, the state of Arizona punishes arson as a misdemeanor if it involves property worth $100 or less. Ariz. Rev. Stat. § 13-1703. That statute might be used, for example, if a local prosecutor decides to

prosecute a teenager and send him to jail overnight after he is caught setting fire to a neighbor's garbage can—a crime, to be sure, but not a particularly serious one. Under the Government's position, however, that crime would be deemed an "aggravated felony." The teenager could be placed in removal proceedings, and his conviction would deprive him of the ability to seek asylum or make a case for relief from deportation—no matter how long he has lived here or what hardship his deportation would cause. There is no reason to believe that Congress intended such an extreme result.

Amici are well suited to assist the Court in understanding the practical implications of this case for individuals fleeing persecution, as well as for all other individuals who may find themselves in deportation proceedings. The National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the Nation's leading law firms, NIJC provides direct legal services to approximately 8,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage. NIJC has a substantial interest in the issue now before the Court, both as an advocate for the rights of refugees and asylum seekers generally and as the leader of a network of pro bono attorneys who regularly represent refugees and asylum seekers in court. Given NIJC's experience and perspective, it is

well-situated to assist the Court in understanding how the "aggravated felony" issue will impact individuals fleeing religious and political persecution, as well as how it will affect others seeking relief from deportation after spending most of their lives here.

The American Immigration Lawyers Association ("AILA") is a national organization composed of more than 13,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a pro bono basis.

Amici share a significant interest in ensuring the fair, uniform, and predictable administration of federal immigration laws. As leaders in the field—and as advocates for the rights of immigrants and refugees—*Amici* are uniquely qualified to address the practical consequences of the Government's position in this case and how those consequences should inform the issues of statutory interpretation.

SUMMARY OF ARGUMENT

1. As a practical matter, the Government's position in this case would expand the definition of "aggravated felony" to include a host of minor state arson convictions, including convictions for crimes

that caused no harm and are subject to only minimal jail time. Whereas federal arson convictions are *always* felonies and tend to be more serious—as reflected by the statute's 5-year mandatory minimum sentence—many state convictions relate to very minor offenses, some of which are punished only as misdemeanors.

This alone is a sufficient reason to reject the Government's interpretation. As this Court has held, it must be "very wary" of applying the "aggravated felony" label in a way "the English language tells us not to expect," *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 575 (2010), unless Congress has provided a "clear statutory command to override [the] ordinary meaning." *Lopez v. Gonzales*, 549 U.S. 47, 55 n.6 (2006). No such clear command exists here—and the English language certainly would not lead any reasonable person to expect that the term "aggravated felony" could be applied to include offenses that are neither felonies nor particularly "aggravated." Accepting Petitioner's interpretation avoids that problem.

2. A noncitizen with an "aggravated felony" conviction faces extensive and severe consequences under the immigration laws, and those consequences counsel against an overbroad interpretation. A lawful permanent resident with a conviction for an aggravated felony is ineligible for "cancellation of removal"—a discretionary, equitable means of relief that Congress has made available to certain long-time residents. A person convicted of an aggravated felony is automatically ineligible for asylum, even if she was or would be persecuted in her country of nationality. A noncitizen with an aggravated felony

conviction may face expedited removal proceedings and mandatory detention. And even for an individual who is never placed in removal proceedings, an aggravated felony conviction serves as a permanent, insurmountable barrier to citizenship.

In view of these grave and often catastrophic consequences, Congress could not have intended to expand the definition of "aggravated felony" to include minor state arson offenses, as the Government's position would hold. An aggravated felony conviction will generally put both asylum seekers and lawful permanent residents on an express train to permanent and irrevocable exile. Congress has reserved this treatment for those convicted of particularly serious crimes, and the Court should keep it that way.

3. This Government's position should also be rejected under the "longstanding principle" of "construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). The Court follows this approach—akin to the criminal rule of lenity—"because deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948).

Here, the Government's position would effectively "banish" or "exile" a longstanding resident based on a minor state arson offense—even if it injured no one, involved property worth less than $100, and subjected the offender to just an overnight stay in jail. Under *St. Cyr*, *Fong Haw Tan*, and other precedents of this Court, the immigration laws

cannot be read to impose such a drastic result without a clear statement by Congress.

ARGUMENT

I. The Government's position would treat many minor state arson offenses—including misdemeanors—as "aggravated felonies," distorting that term's meaning and violating this Court's precedent.

The question framed in this case is whether, for purposes of the definition of "aggravated felony," a state offense can be one "described in" a particular federal criminal statute where it lacks a critical element of that statute—namely, the element relating to interstate commerce. As relevant here, the aggravated felony statute includes the "offense described in * * * 844(d), (e), (f), (g), (h), or (i) of [Title 18] (relating to explosive materials offenses)." 8 U.S.C. § 1101(a)(43)(E)(i). Section 844(i) describes an offense that arises only where the offender "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property *used in interstate or foreign commerce* or in any activity *affecting interstate or foreign commerce*." (Emphasis added). By its nature, this "interstate commerce" element tends to be a feature of *federal* criminal statutes. As a practical matter, then, for that particular subsection of the "aggravated felony" definition, the "described in" formulation generally limits the offense to one prosecuted under federal law.[2]

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[2] Under the categorical approach, "courts may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior

The Government argues otherwise—and the consequences of its argument are extreme. Whereas arson offenses prosecuted under federal law tend to be quite serious—as evidenced by the 5-year mandatory minimum sentence the statute provides, see 18 U.S.C. § 844(i)—state arson offenses may include far less serious crimes, many of which are not felonies at all.

In Arizona, for example, the crime of "knowingly damaging a structure or property through fire" is punished as a class 1 misdemeanor "if the property had a value of one hundred dollars or less." Ariz. Rev. Stat. § 13-1703. An offense satisfying all those elements would necessarily meet all the elements of the federal arson statute—except the element of interstate commerce. Under the Government's position in this case, then, an Arizona conviction for class 1 misdemeanor arson—relating to personal property worth just a few dollars—would qualify as an "aggravated felony."

Arizona is not alone. Many other states also have laws on their books that punish minor arson as a misdemeanor, with minimal fines and jail time. A sample of relevant statutes is provided here:

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offenses * * *," not to the underlying facts. *Descamps* v. *United States*, 133 S. Ct. 2276, 2283 (2013). Neither the Government nor the courts have considered in any detailed way whether there are, in fact, state offenses that would satisfy all the elements of the federal arson statute.

Ariz. Rev. Stat. § 13-1703	"[K]nowingly and unlawfully damaging a structure or property by knowingly causing a fire or explosion *** is a class 1 misdemeanor if the property had a value of one hundred dollars or less."
Colo. Rev. Stat. § 18-4-103	Whoever "knowingly sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any property of another without his consent" is guilty of a class 2 misdemeanor, "if the damage is less than one hundred dollars."
Mich. Stat. § 750.77	Whoever "intentionally damages or destroys by fire or explosive any personal property having a value of $1,000.00 or less * * * is guilty of fifth degree arson, [which is] a misdemeanor."
Minn. Stat. § 609.5632	"Whoever intentionally by means of fire or explosives sets fire to or burns or causes to be burned any real or personal property of value is guilty of a misdemeanor and may be sentenced to imprisonment for not more than 90 days or to payment of a fine of not more than $1,000, or both."
Neb. Rev. Stat. § 28-504	Intentionally setting fire to property or damaging it with an explosive is a misdemeanor if the damage is "less than one thousand five hundred dollars."

N.H. Rev. Stat. § 634:1	Whereas certain categories of arson are punished as a felony—including arson to an occupied or historic structure, or to collect insurance payments, or to property worth more than $1,000—"[a]ll other arson is a misdemeanor."

In all, at least 18 states have misdemeanor arson offenses that could be deemed an "aggravated felony" under the Government's interpretation.[3] Thus, while Petitioner's conviction for third-degree arson was a felony, the Government's interpretation would apply equally to fifth-degree arson under New York law, which is a misdemeanor and is punished accordingly. Compare N.Y. Penal Law § 150.10 (intentionally damaging a "building or motor vehicle" is arson in the third degree, a class C felony) with *id.* § 150.01 (intentionally damaging the "property of another" is arson in the fifth degree, a class A misdemeanor); *id.* § 70.15(1) (imprisonment for a class A misdemeanor "shall not exceed one year").

This is not the first time the Government has attempted to expand the definition of "aggravated felony" in a way that would encompass a minor state offense—and in each instance, this Court has rejected its arguments. See, *e.g.*, *Lopez* v. *Gonzales*, 549 U.S.

[3] See, *e.g.*, Ariz. Rev. Stat. § 13-1703(B); Ark. Stat. § 5-38-301(b)(1); Colo. Rev. Stat. § 18-4-103(3); D.C. Code § 22-303; Haw. Rev. Stat. § 708-8254; Iowa Code § 712.4; Md. Code, Crim. Law § 6-105(c); Mich. Stat. § 750.77(3); Minn. Stat. § 609.5632; Neb. Rev. Stat. § 28-504(3); N.H. Rev. Stat. § 634:1(IV); N.M. Stat. § 30-17-5(B); N.Y. Penal Law. § 150.01; Ohio Rev. Code § 2909.03(B)(2)(a); S.C. Code § 16-11-150(a); Utah Code § 76-6-102(5); Va. Code. § 18.2-80; Wyo. Stat. § 6-3-104(b).

47, 56-57 (2006); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 575 (2010); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1693 (2013). As this Court has explained, the term "aggravated felony" should be given its "common-sense conception" wherever possible. *Lopez*, 549 U.S. at 53. It should not be interpreted in a way "the English language tells us not to expect" without a clear statutory command. *Carachuri-Rosendo*, 560 U.S. at 575.

Under any common-sense understanding, a "felony" "is a serious crime usually punishable by imprisonment for more than one year or by death." *Id.* at 574 (internal quotation marks and alteration omitted). Indeed, federal law itself defines a felony as a crime punishable by "more than one year" in jail. 18 U.S.C. § 3559(a)(5). In addition, "an 'aggravated' offense" is generally understood to be a felony "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime." *Carachuri-Rosendo*, 560 U.S. at 574 (internal quotation marks omitted). Obviously, a conviction for arson punishable by "imprisonment for not more than 90 days" (Minn. Stat. § 609.5632) is neither a "felony" nor "aggravated" under a common-sense interpretation.[4]

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[4] At one time, the Board of Immigration Appeals would have agreed. In *Matter of Crammond*, the Board held that only a *felony* conviction for "sexual abuse of a minor" could be "considered an 'aggravated felony' under section 101(a)(43)(A)." 23 I. & N. Dec. 9, 14 (en banc), *vacated on other grounds*, 23 I. & N. Dec. 179 (BIA 2001) (en banc). The Board reasoned that the statute did not clearly indicate whether misdemeanors could equal "aggravated felonies," and accordingly it "turn[ed] to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Ibid.* (internal quotation marks omitted). Some courts of appeals, however,

As Petitioner's brief explains, the language in the "aggravated felony" definition does not provide the "clear statutory command" necessary to overcome the term's common-sense meaning. Take, for example, the penultimate sentence of § 1101(a)(43)—which sweeps in any "offense described in this paragraph whether in violation of Federal or State law." That sentence has been interpreted by this Court to mean that for any offense identified specifically by reference to a federal statute, a state offense is included only if its elements "include the elements" of the federal one. *Lopez*, 549 U.S. at 57. Some of the federal offenses listed in § 1101(a)(43) do have a state law analog. See, *e.g.*, 8 U.S.C. § 1101(a)(43)(A) ("murder," "rape"). Some, however, necessarily do not. See *id.* §§ 1101(a)(43)(H) (offense "described in" federal statute that criminalizes using the Postal Service to demand ransom), (E)(iii) (offense "described in" statute relating to noncompliance with Internal Revenue Code regarding firearms), (L)(i) (offense "described in" federal statute relating to treason against the United States).[5]

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disagreed with the Board's view. See, *e.g.*, *Guerrero-Perez* v. *Holder*, 242 F.3d 727, 737 (7th Cir. 2001). The Board eventually reversed its stance and held that misdemeanors can be "aggravated felonies" under the immigration laws without any clear congressional statement to that effect. See *Matter of Small*, 23 I. & N. Dec. 448, 450 (BIA 2002) (en banc).

[5] Nor would this interpretation "leave subparagraph [(E)(i)] with little, if any, meaningful application." Cf. *Nijhawan* v. *Holder*, 557 U.S. 29, 39 (2009). In *Nijhawan*, there was no federal statute that directly matched the aggravated felony definition, and few state statutes would have done so; thus, adopting Nijhawan's argument would have resulted in a "limited and * * * haphazard" statute. *Id.* at 40. By contrast, Petitioner's argument here would respect the distinct and precise way

For arson, by referring to an "offense described in" § 844(i)—rather than using the generic term "arson"—Congress limited its definition to convictions that would meet the elements of the federal arson statute, including the element of "interstate commerce." As a practical matter, that may well mean that a state arson conviction will not qualify as an aggravated felony under§ 1101(a)(43)(E)(i). But there is nothing absurd or unexpected about that, given that state arson convictions are often far less serious than federal ones. And in any event, state arson convictions that trigger a sentence of more than one year may still qualify as "aggravated felonies" under a different section of the definition—the provision for "crimes of violence" for which the term of imprisonment is "at least one year." 8 U.S.C. § 1101(a)(43)(F); *Matter of Palacios*, 22 I. & N. Dec. 434, 437 (BIA 1998) (so holding).[6] It would have been entirely reasonable for Congress to conclude that this is adequate to protect the interests of the United States where state-law arson is concerned. Petr. Br. 36–38.

Congress chose to define aggravated felonies, whereas it is the Government's approach that would lead to a strained and unusual result.

[6] Moreover, a particular state arson conviction might still have immigration implications even if it is not an "aggravated felony." For example, arson has been held to involve moral turpitude and thus may trigger removability or inadmissibility. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i), 1227(a)(2)(A); *Vuksanovic v. U.S. Atty. Gen.*, 439 F.3d 1308, 1312 (11th Cir. 2006); *Matter of S--*, 3 I. & N. Dec. 617–18, 1949 WL 6507 (BIA 1949). And as discussed below, a judge evaluating whether to grant discretionary relief may take even a minor conviction into account. *Infra* at 19.

Indeed, it is not clear that Congress even intended to include all *federal* arson felonies as "aggravated felonies." Its reference to § 844(i) includes a parenthetical specifying "explosive materials offenses" (8 U.S.C. § 1101(a)(43)(E)(i)), thus apparently excluding any offense based solely on "fire" (18 U.S.C. § 844(i) ("fire or an explosive")). In all, the level of precision Congress used to lay out this definition—with some offenses described generally ("burglary") and some described based on their specific elements (the offense "described in * * * 844(i) of that title (relating to explosive materials offenses)")—cannot simply be brushed aside.

II. The catastrophic, irrevocable consequences of an aggravated felony conviction counsel against an overbroad interpretation.

A conviction for an "aggravated felony" has devastating consequences under the immigration laws, for lawful permanent residents and asylum seekers alike. As courts have imposed no statute of limitations to limit these consequences, the passage of time is no comfort; a noncitizen may be deported based on an aggravated felony conviction many years after it occurs—even when the conviction is only later classified as an aggravated felony. See 8 U.S.C. § 1227(a)(2)(A)(iii); *e.g.*, *Perriello* v. *Napolitano*, 579 F.3d 135, 137 (2d Cir 2009) ("We acknowledge the significant hardship that Perriello and his family will face as a result of the unaccountable delay in the decision to seek his removal decades after his conviction, and notwithstanding his evidently lawful and productive life in the interval."), *Kuhali* v. *Reno*, 266 F.3d 93 (2d Cir. 2001) (finding a noncitizen

deportable pursuant to a removal order issued more than twenty years after the predicate conviction).

The gravity of these consequences counsels against adopting the Government's position. Under the circumstances, Congress could not have intended to impose such grave consequences based upon relatively minor state-law offenses. We outline some of the most serious consequences below.

A. An aggravated felony conviction precludes a longtime resident from seeking relief from removal no matter how inequitable the result.

As Mr. Luna's own case demonstrates,[7] a determination that a particular offense was an "aggravated felony" can have catastrophic consequences, even for longstanding residents of the United States. Most importantly, a person convicted of an aggravated felony may not seek "cancellation of removal." 8 U.S.C. §§ 1229b(a)(3). "Cancellation of removal" is a form of discretionary relief; through this mechanism, Congress allows individuals who have lived in the United States for at least seven years following their admission, and who have been lawful permanent residents for at least five years, to make a case to stay in the United States based on the equities. Positive factors include family ties within the United States, residency of long duration, evidence of hardship to the respondent and family if deportation occurs, service in the Armed Forces, history of employment, existence of property or

[7] Although the removal proceedings use Petitioner's full name, Jorge Luna Torres, he refers to himself as George Luna, and that preference is respected here.

business ties, existence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and evidence attesting to a respondent's good moral character. See, *e.g.*, *Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998); *Matter of Wadud*, 19 I. & N. Dec. 182 (BIA 1984); *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978).

Given the grave consequences of deportation, it should come as no surprise that Congress created this mechanism for relief. These consequences are felt as much by the family, friends, and community of the noncitizen as they are by the noncitizen himself. Deporting a child's mother or father effectively breaks apart a family forever and may leave a young American citizen to fend for himself. And the effects of deportation are even more pronounced in lower-income families who cannot afford to travel back and forth between the United States and their country of origin to visit loved ones.

For a lawful permanent resident ("LPR") like Mr. Luna—who has lived in this country for nearly all his life—deportation is among the most extreme punishments imaginable. It amounts to permanent exile from the only home he has ever known. Many of these noncitizens have spent their entire lives in the United States and do not even remember their time in the nation to which they are being deported.[8] As Learned Hand once observed:

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[8] See, *e.g.*, *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171 (5th Cir. 2008) (LPR since 1977, 30 years in U.S.); *Lopez-De Rowley* v. *INS*, 253 F. App'x 62, 64 (2d Cir. 2007) (LPR since 1970) *Knuteen* v. *Gonzales*, 429 F.3d 733, 735, 739–40 (7th Cir. 2005) (LPR since 1957); *Chang* v. *INS*, 307 F.3d 1185, 1187–90 (9th Cir. 2002) (LPR since 1975); *Ferreira* v. *Ashcroft*, 382 F.3d 1045,

> We think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in [his country of origin] as any one born of ancestors who immigrated in the seventeenth century. However heinous his crime, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized people.

United States ex rel. Klonis v. *Davis*, 13 F.2d 630, 630 (N.Y. 1926); accord *Jordan* v. *De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (deportation means "a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens").

Under the Government's position in this case, a lawful permanent resident who was convicted of a minor state arson misdemeanor will have no ability to access this form of relief. He will not have any

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1047 (9th Cir. 2004) (LPR since age 11); *Valenzuela-Zamarano* v. *Ashcroft*, 11 F. App'x 805, 806 (9th Cir. 2001) (LPR since age five); *Amaral* v. *INS*, 977 F.2d 33 (1st Cir. 1992) (LPR since age two); *Shurney* v. *INS*, 201 F. Supp. 2d 783, 786 (N.D. Ohio 2001) (entered U.S. at age three); *Minto* v. *Mukasey*, 302 F. App'x 13 (2d Cir. Dec. 5, 2008) (entered U.S. at age eight); *Fernandez* v. *Mukasey*, 544 F.3d 862 (7th Cir. 2008) (Nos. 06-3987, 06-3994, 06-3476) (two LPRs, one in the U.S. since age nine, another in the U.S. for over 40 years); *Matter of Flores-Gomez*, 2004 WL 2374449, at *1 (BIA Jul. 27, 2004) (admitted to U.S. in 1943).

opportunity to argue that as a matter of equity, he should be allowed to remain in this country. He will have no ability to present evidence weighing in favor of cancellation—like family ties, history of employment, proof of rehabilitation, and good moral character—and no immigration judge will have the power to consider such factors. He will face automatic deportation, no matter how long he has lived here, how minimal his connections are to his country of origin, how many people here are depending on him, and how much of a hardship his deportation would create for his family and community. It is difficult to imagine how devastating this would be—both to the noncitizen himself and to his family.

These consequences are particularly troubling with respect to individuals who have served in the U.S. Armed Forces. For any lawful permanent resident who finds himself in removal proceedings, a record of military service would ordinarily weigh in favor of granting cancellation of removal. Many lawful permanent residents serve in the U.S. military, and the linguistic and cultural diversity they bring to their service is especially valuable in the context of national security. ANITA U. HATTIANGADI ET AL., NON-CITIZENS IN TODAY'S MILITARY: FINAL REPORT 1 (2005). Indeed, in recognition of the benefits that noncitizens can offer the military, the Government's recruitment of noncitizens is on the rise. Gerry J. Gilmore, *Military Recruits Non-citizen Health Care Workers, Linguists*, AMERICAN FORCES PRESS SERVICE, Dec. 5, 2008. There are approximately 29,000 noncitizens serving in the United States military currently, with another 8,000 enlisting each year. *Ibid.* Under the Government's

position, however, a veteran who committed a minor state arson offense—no matter how long ago—would have no opportunity to argue for relief based upon his military service, or based upon the hardship his removal would present to his family.

Importantly, cancellation of removal remains a matter of discretion. See *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013). A ruling in Petitioner's favor would not mean that he would "escape[] deportation"; it would only mean that he would "avoid[] mandatory removal." *Ibid.* Accordingly, as this Court has already observed, "to the extent that [its] rejection of the Government's broad understanding of the scope of 'aggravated felony' may have any practical effect on policing our Nation's borders, it is a limited one." *Ibid.* (citing *Carachuri-Rosendo*, 560 U.S. at 581).

In borderline cases, the exercise of discretion is a far better way to assess the gravity of an offense under the circumstances. The weighing of equities may include the fact that the applicant was previously convicted of a crime, taking into account whether the offense was minor or serious, how long ago it was committed, and whether he has demonstrated that he has changed his ways—along with other factors such as his military service, character, family ties, employment history, and hardship to family members. An immigration judge is well-suited to make that determination, exercising discretion based on a full record. Absent a clear statutory command, this Court should not assume that Congress intended to replace that discretion with the blunt instrument of denying all relief.

B. An aggravated felony conviction bars a noncitizen from seeking asylum.

An aggravated felony conviction permanently blocks a noncitizen from seeking refuge in the United States based on a well-founded fear that he will face persecution or death if returned to his country of origin. The gravity of this consequence means that the Court should be particularly cautious about any effort to expand the definition of "aggravated felony." Indeed, the history of refugee protection in the United States demonstrates that a noncitizen should be barred from this relief only if his crime was particularly serious.

The current mechanism for asylum in the United States was born more than 40 years ago, when the United States acceded to the Protocol Relating to the Status of Refugees. Under the Protocol, the United States made a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *INS* v. *Stevic*, 467 U.S. 407, 416 (1984). Article 33 of the Convention—incorporated by reference and reproduction into the Protocol—"provides an entitlement for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). It states:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality,

> membership of a particular social group or political opinion.

PROTOCOL RELATING TO THE STATUS OF REFUGEES, art. 33, 19 U.S.T. 6223.

Article 33 also describes two narrow categories of refugees who are not entitled to this protection, in view of the danger they would present to the host country:

> The benefit of the present provision may not * * * be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of *a particularly serious crime,* constitutes a danger to the community of that country.

CONVENTION RELATING TO THE STATUS OF REFUGEES, July 28, 1951, art. 33(2), 189 U.N.T.S. 150 (emphasis added).

In recognition of the Protocol and Convention, Congress made a series of changes to the Immigration and Nationality Act ("INA"), including to add a provision codifying the method by which a refugee can apply for asylum. 8 U.S.C. § 1158; *Cardoza-Fonseca*, 480 U.S. at 423. Asylum is a form of discretionary relief that allows the noncitizen to stay and work legally in the United States, seek derivative asylum status for family members, and ultimately seek permanent residence and citizenship. See, *e.g.*, 8 C.F.R. § 209.2; 8 U.S.C. § 1158.[9]

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[9] Congress also created a separate form of relief, known as "withholding of removal," which is mandatory upon a showing of a clear probability of persecution. 8 U.S.C. § 1231(b)(3). By

Congress also incorporated language that tracks the exception in the second paragraph of Article 33. Thus, it placed the relief of asylum off-limits for any refugee who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community." 8 U.S.C. § 1158(b)(2)(A)(ii). Congress further defined "particularly serious crime" to include any "aggravated felony." *Id.* § 1158(b)(2)(B)(i).

Under these provisions, any person convicted of an "aggravated felony" is statutorily barred from seeking asylum, regardless of the severity of the threat faced upon return to the country of origin. This statutory bar can and does result in the deportation of noncitizens to countries where they face imminent harm.[10] Yet the context and language of these provisions demonstrates that Congress intended the term "aggravated felony" to be equivalent to a "particularly serious crime" that makes the individual "a danger to the community." This undermines the Government's argument—

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itself, however, this form of relief does not address all of this Nation's obligations under the Protocol. For instance, the Protocol requires that to the extent possible, each nation must facilitate the assimilation of refugees into society. By definition, "withholding of removal" cannot achieve this; only a grant of asylum allows a refugee to achieve lawful permanent residence status and thus to move toward full assimilation in U.S. society, including naturalization. 8 U.S.C. §§ 1445–1448; see also CONVENTION art. 28 (requiring nations to provide refugees with travel documents); 8 C.F.R. § 223.1 (denying such documents to recipients of "withholding" relief).

[10] See, *e.g.*, *Berhe* v. *Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006) (even in the face of severe religious persecution in an Eritrean national's country of origin, access to relief depended in the first instance on whether prior conviction was an aggravated felony).

which, as shown above, would expand the definition to include a variety of very minor state arson convictions.

C. An aggravated felony conviction subjects certain noncitizens to expedited removal and mandatory detention.

An aggravated felony conviction may also make the process of removal faster and may deprive the noncitizen of access to resources and the opportunity to defend himself. The INA provides for the creation of special expedited removal proceedings for noncitizens with a conviction for an aggravated felony. 8 U.S.C. § 1228. This entails a conclusive presumption of deportability and virtually no procedural protections ensuring the right to contest the charges effectively. *Id.* § 1228(c).

The denial of these protections could have devastating consequences. In one recent case, for example, a Congolese woman was summarily ordered removed based on a 2011 conviction for misdemeanor battery, which the Department of Homeland Security classified as an aggravated felony. *Malu* v. *U.S. Atty. Gen.*, 764 F.3d 1282, 1284 (11th Cir. 2014), cert. dismissed per Rule 45, *Malu* v. *Lynch*, No. 14-1044, 2015 WL 802339 (U.S. May 14, 2015). That allegation was in error under *Johnson* v. *United States*, 559 U.S. 133 (2010). See *United States* v. *Diaz-Calderone*, 716 F.3d 1345, 1349 (11th Cir. 2013). But appearing pro se, Ms. Malu did not submit legal arguments against these charges within the ten-day period given to her to mount a defense. After a lengthy appeals process, the Eleventh Circuit concluded that because she had failed to contest her aggravated felony status within those ten days, she

had failed to exhaust administrative remedies and was barred from seeking relief based on her fear of persecution. *Malu*, 764 F.3d at 1287. Although the Government ultimately settled the litigation with Ms. Malu and allowed her to remain here, the Eleventh Circuit's decision demonstrates the potentially dire consequences of expedited proceedings.

At the same time, a noncitizen with an aggravated felony conviction may face extended, mandatory detention without the possibility of bond. 8 U.S.C. § 1226(c)(1). People in removal proceedings often sit in Immigration and Customs Enforcement custody for months, or even years, before the courts adjudicate their cases. See, *e.g.*, *Flores-Torres* v. *Mukasey*, 548 F.3d 708 (9th Cir. 2008) (detaining an immigrant for over two years during removal proceedings initiated on account of an aggravated felony conviction); *Valansi* v. *Reno*, 278 F.3d 203 (3d Cir. 2002) (detaining an immigrant pursuant to section 1226(c) for nearly a year pending the completion of removal proceedings). Pre-removal detention is highly disruptive to the noncitizen's life, can prevent him or her from being in a position to arrange for care for family members after deportation, and limits his access to resources that might assist in preventing removal. Thus even during the removal process itself, an aggravated felony conviction can have grave consequences.

D. An aggravated felony conviction is a permanent bar to naturalization.

An aggravated felony conviction also makes it impossible for a noncitizen to show good moral character. Among other consequences, this operates as a permanent barrier to citizenship, as long as the

conviction occurred after the INA amendments became effective in 1990. An applicant for naturalized citizenship must demonstrate good moral character for a period of time, generally for five years prior to filing. 8 U.S.C. § 1427(a)(3); 8 C.F.R. § 316.2(a)(7). By statute, however, "[n]o person shall be regarded as, or found to be, a person of good moral character * * * who at any time has been convicted of an aggravated felony." 8 U.S.C. § 1101(f)(8). Therefore, a person with an aggravated felony conviction is permanently barred from naturalization, regardless of the severity of the predicate offense, any showing of rehabilitation, or the passage of time since the conviction.

This stringent bar to citizenship remains even if the aggravated felony was "waived" many years ago for purposes of obtaining legal permanent resident status, and even if the crime was committed prior to its categorization as an aggravated felony.[11] As a matter of fairness—and under the rule of lenity, discussed below—this Court should not impose such an irrevocable and drastic consequence on a minor state offense unless Congress says so explicitly.

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[11] Letter, Miller, Acting Asst. Comm. Adjudications HQ 316-C (May 5, 1993), reprinted in 70 No. 22 *Interpreter Releases* 752, 769-70 (June 7, 1993); *Chan* v. *Gantner*, 464 F.3d 289, 292–94 (2d Cir. 2006) (applying § 1101(a)(43)(N) and (U) retroactively such that a conviction for conspiracy to commit alien smuggling barred citizenship for lack of good moral character despite a prior waiver); *Socarras* v. *DHS*, 672 F. Supp. 2d 1320, 1324–25 (S.D. Fla. 2009) (aggravated felony bar to naturalization was not waived where petitioner had received a waiver for crime when she became an LPR).

III. The Government's position violates this Court's canon construing ambiguity in the immigration laws in favor of noncitizens.

As Petitioner's brief explains, the plain language of § 1101(a)(43)(E)(i) requires holding that a state offense must satisfy *all* elements of the relevant federal criminal statute in order to qualify as an "offense described in" 18 U.S.C. § 844(i). That includes the element of interstate commerce. In the event that the Court finds the statute ambiguous, however, any ambiguity should be construed in favor of the noncitizen, given the tremendously harsh consequences that would otherwise result.

For many years, this Court has recognized a "longstanding principle" of "construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]." *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). This principle—akin to the criminal rule of lenity—applies to the immigration laws in light of the harsh consequences that flow from deportation, as discussed above. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948) (resolving statutory ambiguities in favor of noncitizen "because deportation is a drastic measure and at times the equivalent of banishment or exile"). In *Leocal* v. *Ashcroft*, for example—another case that turned on whether a particular conviction would lead to a lawful permanent resident's deportation—this Court explained that even if the plain language did not require it, "we would be constrained to interpret any ambiguity in the statute in petitioner's favor." 543 U.S. 1, 12 n.8 (2004).

This canon of construction has particular force in situations where a favorable interpretation of a predicate statute serves that statute's "humanitarian purpose." *INS* v. *Errico*, 385 U.S. 214, 225 (1966) (interpreting an INA provision to preclude the deportation of a noncitizen who obtained entry through misrepresentation under certain conditions). As discussed above, the statutes providing for cancellation of removal and asylum were enacted to avoid overly harsh results, to protect the interests of United States citizens who would suffer extreme hardship due to a noncitizen's removal, and (for asylum) to reflect the United States' international treaty obligations.[12] All of these purposes call for application of this canon.

This case demonstrates why this principle is so important. Mr. Luna was sentenced to one day's imprisonment and five years of probation. Yet after spending 32 years among us—working hard, buying a home, going to school, and providing for himself and his fiancé as she completes an advanced degree—his hopes hang on the interpretation of a statute that has stumped educated lawyers. *Padilla* v. *Kentucky*, 559 U.S. 356, 378 (2010) (Alito, J. concurring in the judgment) (noting "as has been widely acknowledged, determining whether a particular crime is an 'aggravated felony' or a 'crime involving moral turpitude' is not an easy task"). If the statute is unclear, then Mr. Luna could not have been on notice of the consequences of his actions when he committed

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[12] Cf. *Murray* v. *Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains").

them—a fundamental Due Process problem that the rule of lenity and this canon are designed to solve.

In short, any ambiguity in the definition of "aggravated felony" should be resolved in favor of Mr. Luna. This canon of construction counsels that the Court should remain wary of interpretive expansion. If Congress wishes to extend the devastating consequences of an aggravated felony conviction to minor state law offenses, it must express its intention in clear statutory terms.

CONCLUSION

Amici urge this Court to reverse the decision of the Second Circuit and hold that for purposes of 8 U.S.C. § 1101(a)(43), a crime is not an "offense described in" a federal criminal statute unless it meets *all* the elements of that statute, including the interstate commerce requirement.

Respectfully submitted.

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